Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

SENEL TAYLOR, JOHNNIETTA MCGRADY, CHRISTINE SUMA, ARKELA WINSTON, and AMY HUDOCK,

Petitioners,

v.

DORIS SIMMONS-HARRIS, MARLA FRANKLIN, REV. STEVEN BEHR, SUE GATTON, MARY MURPHY, REVEREND MICHAEL DEBOSE, CHERYL DEBOSE, GLENN ALTSCHULD, and DEIDRA PEARSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a program designed to rescue economically disadvantaged children from a failing public school system by providing scholarships that they may use in private, religious, or suburban public schools that choose to participate in the program – and which operates in the context of a broad array of public school choices – violate the First Amendment because in the early stages of the program most of the schools that have agreed to take on scholarship students are religiously affiliated?

2. Given that the same issue was decided previously by the Ohio Supreme Court in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), did the court below err in (a) finding that the instant case was not precluded by collateral estoppel or (b) refusing to certify the question to the Ohio Supreme Court to determine the preclusive effect of Ohio law?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit to which this petition is directed is reported at 234 F.3d 945 (6th Cir. 2000), and is reprinted in the Appendix (A. 1). The opinion of the United States District Court for the Northern District of Ohio granting plaintiffs/respondents' motions for summary judgment is reported at 72 F. Supp. 2d 834 (N.D. Ohio 1999) (A. 65). The district court's opinion denying intervenors-defendants/petitioners' (hereinafter "petitioners") motion for certification to the Ohio Supreme Court is set forth in the Appendix (A. 142).

JURISDICTION

The decision of the Sixth Circuit was entered on December 11, 2000 (A. 1). The order of the Sixth Circuit denying the petitions for rehearing and rehearing en banc was entered on February 28, 2001 (A. 150). The decision and order of the Sixth Circuit granting a stay of the mandate was entered on March 8, 2001 (A. 151).

The Court has jurisdiction to review the judgment of the Sixth Circuit under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The challenged Cleveland Pilot Project Scholarship Program is codified at Ohio Rev. Code §§ 3313.974-3313.979, reprinted in full in the Appendix (A. 152).

STATEMENT OF THE CASE

A. Factual Background. The Cleveland City School District (CCSD) is one of the most troubled urban school districts in the nation. Newspaper headlines from the mid-1990s, when the program at issue in this lawsuit was created, paint a picture of a school system beset by virtually every conceivable problem, from poor academics to administrative problems to chronic violence. See, e.g.,

Patrice M. Jones, "9th-Graders Falter on Proficiency Tests," *Cleveland Plain Dealer* (Mar. 20, 1994) at 1B (reporting that only 11 percent of CCSD ninth graders passed the State's proficiency examinations); Scott Stephens, "Officials Continue Test-Cheating Probe," *Cleveland Plain Dealer* (Aug. 3, 1994) at 2B; Scott Stephens, "Transportation Traumas: Cleveland Parents Protest Busing Cuts," *Cleveland Plain Dealer* (Sept. 7, 1994) at 1B; Patrice M. Jones, "Schools Slide Into Disrepair," *Cleveland Plain Dealer* (Sept. 11, 1994) at 1B; Scott Stephens, "School Board Unveils Steps to Curb Violence," *Cleveland Plain Dealer* (Oct. 29, 1994) at 1B; Patrice M. Jones, "[Mayor] White Says It's Time for a Change in Schools," *Cleveland Plain Dealer* (Nov. 13, 1994) at 1A; Mark Skertic, "Cleveland Public Schools: Ohio's Largest District in Chaos," *Cincinnati Enquirer* (Mar. 19, 1995) at A1; Evelyn Theiss, "School Board Repeats Failed Reform Pattern," *Cleveland Plain Dealer* (Aug. 27, 1995) at 6B; "Sweeps Week Continues With 91 More Truants," *Cleveland Plain Dealer* (Sept. 27, 1995) at 4B; Maggi Martin, "East High Student Shot by Man in Ski Mask," *Cleveland Plain Dealer* (Dec. 12, 1995) at 2B; Patrice M. Jones, "Summit on School Woes Draws 2,000: City Parents, Students, Others Look for Ways to Fix System," *Cleveland Plain Dealer* (Jan. 28, 1996) at 2B.

The combination of administrative mismanagement and lack of educational opportunities in CCSD combined to create a state of emergency, leading the U.S. District Court for the Northern District of Ohio, in the context of an ongoing desegregation lawsuit, to transfer control of the school district to the State of Ohio. *Reed v. Rhodes*, slip op., No. 1:73 CV 1300 (N.D. Ohio, Mar. 3, 1995). The following year, the court commended the State for acting swiftly to "alleviate the emergency," *Reed v. Rhodes*, 934 F. Supp. 1533, 1539 (N.D. Ohio 1996), through a variety of measures, including steps to "[p]rovide choices to each child which will include the opportunity to attend

schools and programs of the family's selection." *Id.* at 1557.

One of the choice programs that the State created was the Cleveland Pilot Project Scholarship Program (hereafter "scholarship program"), Ohio Rev. Code §§ 3313.974-3313.979 (A. 152-66). Enacted in the 1995 State budget and made operational in the 1996-97 school year, the program embodies two features: it expanded the pre-existing range of educational options for Cleveland schoolchildren to include private and suburban public schools that agreed to participate in the program, and it provided tutorial assistance grants for children in CCSD. In the school choice part of the program, students may receive scholarships of either 75 or 90 percent of tuition (depending on family income) to attend the participating private schools of their parents' choice. The scholarships are capped at $2,500 or the amount of tuition, whichever is less. Participating private schools may not charge more than the scholarship amount for tuition. Participating suburban public schools would receive the scholarship plus the "average daily membership" expenditure (approximately $4,294 per student, for a total of $6,544) provided by State law. Ohio Rev. Code §§ 3317.03(I)(1), 3327.061, 3317.08(A)(1). The program began with students in grades K-3, expanding one grade each year through eighth grade. If more children apply for the program than there are spaces, as routinely occurs, they are chosen by a lottery with a preference for economically disadvantaged children and a ceiling on the percentage of children who were already enrolled in private schools. Participating schools also have to choose students on a random selection basis. Checks are made payable to the parents and disbursed to them at the schools they designate. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d at 836 (A. 71).

In addition to the scholarships made available for students whose parents select non-district schools, the program makes available an equal number of tutorial assistance grants for students remaining in CCSD. These

grants are capped at $500 per student and may be used to obtain additional academic assistance outside regular school hours.

In the 1999-2000 school year, 3,761 students received scholarships under the program. No suburban public schools have ever agreed to participate in the program. However, in the same school year, 46 religious and ten nonsectarian private schools volunteered to enroll students using scholarships. Of the students in the program that year, 96 percent enrolled in religiously affiliated schools.

The scholarship program operates in the broader context of a pre-existing array of public school choices, including magnet schools and community schools (also known as charter schools). See Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* (1999) at 100-05.[1] Students who choose magnet schools receive full tuition in the amount of $7,097 per pupil, while students choosing community schools receive full tuition of at least $4,518 per pupil. In 1999-2000, 16,184 Cleveland students were enrolled in magnet schools and another 2,087 were enrolled in community schools. Thus, when public schools of choice are included in the equation, only 16.5 percent of Cleveland schoolchildren attending schools of choice were enrolled in religiously affiliated schools. *Id.* at 105; Affidavit of Caroline Hoxby, ¶¶ 4c-4d. At least 3,637 children, all of them qualifying for 90 percent scholarships, are currently participating in the Cleveland Pilot Project Scholarship Program.[2]

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[1] All of the affidavits and unpublished studies cited in this Petition are a part of the record.

[2] As the number is subject to legislative appropriation and has increased each year, the actual number of children participating in the program this year is probably greater.

B. Proceedings Below. Virtually identical plaintiffs brought a number of state and federal constitutional challenges, including a First Amendment establishment clause claim, in two consolidated lawsuits filed in state court in 1996. Attempts to enjoin the program were rejected, and the program operated continuously throughout the state court litigation. In *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), the Ohio Supreme Court sustained the program on most grounds that were raised against it. The court invalidated one portion of the program's selection criteria on First Amendment grounds but severed the unconstitutional portion from the remainder of the program, *id.* at 210, holding that the rest of the program satisfied First Amendment standards. The court then invalidated the rest of the program on the ground that it was enacted as part of the state budget in violation of the Ohio Constitution's single-subject rule. The Court stayed its single-subject holding through the end of the fiscal year, and in the interim the Legislature re-enacted the program, thereby curing the state constitutional violation. Although the Legislature acted to restore the program before plaintiffs' time expired to file a petition for a writ of *certiorari* with this Court, they instead filed two new lawsuits in federal court, which were consolidated in the instant proceeding, raising the same First Amendment claim that was rejected in the state court litigation. Petitioners, who are economically disadvantaged parents acting on behalf of their children who are scholarship beneficiaries, intervened as defendants.

On August 27, 1999, hours before the 1999-2000 school year and the fourth year of the scholarship program were to begin, the U.S. District Court for the Northern District of Ohio enjoined the program. Four days later, acknowledging the adverse impact of its action, the court partially stayed the injunction. In November 1999, this Court stayed the entire injunction pending disposition by the U.S. Court of Appeals for the Sixth Circuit. *Zelman v. Simmons-Harris*, 528 U.S. 983 (1999). The district

court subsequently struck down the program on cross-motions for summary judgment. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (A. 142). In a separate unpublished order, the court also denied petitioners' motion to certify to the Ohio Supreme Court the question whether its decision on the First Amendment issue precluded further litigation in federal court (A. 142). A panel of the Sixth Circuit affirmed over a dissent on the First Amendment issue by Judge James Ryan. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000) (A. 1). The Sixth Circuit denied petitions for rehearing and rehearing en banc (A. 150). The Sixth Circuit granted motions to stay the mandate pending disposition in this Court (A. 151).

REASONS FOR GRANTING THE PETITION

I. THE FATE OF NEARLY FOUR THOUSAND SCHOOLCHILDREN – AND OF AN EDUCATION REFORM THAT HOLDS ENORMOUS PROMISE – DEPENDS UPON THIS COURT'S DECISION TO GRANT THE PETITION.

Forty-seven years have passed since this Court made a sacred promise of equal educational opportunities regardless of race. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). We have made great strides over a half-century, but progress has been painfully uneven. In particular, inner-city public schools, with heavily poor and minority student populations, have worsened dramatically. Only last month, the results from the 2000 National Assessment of Educational Progress revealed that 63 percent of black and 56 percent of Hispanic fourth-graders are below the most basic levels of proficiency in reading. The report found that the black/white achievement gap has actually widened since 1992. National Center for Education Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* at 31 & 33.

For several thousand poor, mostly minority youngsters in one of the nation's most troubled urban school districts, the Cleveland Pilot Project Scholarship Program provides an educational life preserver. The real-world stakes of this Petition for nearly four thousand children from economically disadvantaged families cannot be overstated. Petitioner Senel Taylor explains the impact of the program on his family in a 1999 affidavit:

> Our daughter, Saletta, is ten years old and is in the fourth grade at New Hope Christian Academy, a private school.
>
> When I heard about the Cleveland Scholarship and Tutoring Program, I jumped at the chance to apply for a scholarship for Saletta. She has been in the program for two years. The scholarship has allowed Saletta to receive an excellent education.
>
> Saletta attended public school for a couple of years. She failed first grade and had to repeat it. Fortunately, it was right around that time that I learned of the [scholarship program]. We applied and thankfully Saletta was accepted.
>
> Saletta's progress at New Hope Christian Academy has been excellent. Her grades have improved dramatically. She likes Second New Hope much better than her public school, and as a result is excelling in school. . . .
>
> If the [program] is not allowed to continue, Saletta will have to go back to public school. My wife and I cannot afford to send her to Second New Hope without the scholarship. This would be devastating to Saletta. She has had so much success at Second New Hope, and I know this would not continue if she has to return to public school.

Affidavit of Senel Taylor, ¶¶ 2-5 and 8. On a broader scale, Councilwoman Fannie Lewis, who represents the

city's impoverished Ward 7 Hough neighborhood, attests that "families of limited economic means desperately need educational alternatives beyond those currently available in the Cleveland public schools. . . . [T]he scholarship program is essential to improving the educational opportunities for the children of the Hough community." Declaration of Fannie Lewis, ¶ 4.[3]

The children in the scholarship program are precisely those most likely to be left behind. The participants are overwhelmingly poor and minority, starkly so even by comparison to those remaining in a school district in which minority and low-income youngsters predominate. Scholarship students have lower family incomes than CCSD students as a whole ($15,769 vs. $19,948); they are more likely to be raised in single-family homes (68.2 percent vs. 40 percent); and they are mostly black (68.7 percent vs. 45.9 percent). Greene at 98. They will be at grave risk if the program is discontinued.

As the official State evaluation found, "The most important factors for applying to the scholarship program were educational quality and school safety," which were identified by 96.4 percent and 95 percent of parents in the program, respectively. (Religion was the least important of the five factors considered.) Indiana University, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program (1996-1999)* at 124. After the first two years, the evaluation found limited but positive effects on academic achievement. *Id.* at 129. The Cleveland findings accord with studies that have consistently found that inner-city

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[3] Cleveland, in turn, is a microcosm for large cities around the nation. In 2000, 1.25 million low-income, inner-city students applied for 40,000 privately funded K-12 scholarships, including 44 percent of all eligible children in Baltimore, 33 percent in Washington, DC, and 29 percent in New York City. Rees, *School Choice 2000: What's Happening in the States* at xvii.

private schools exert a positive influence on educational achievement among low-income youngsters. See, e.g., Derek Neal, "The Effects of Catholic Secondary Schools on Educational Achievement," 15 *J. Labor Econ.* 98, 162-94 (1997); Chubb and Moe, *Politics, Markets, and America's Schools* (1990); Coleman, *et al.*, *High School Achievement* (1982).

If the program is discontinued, the youngsters in the program would have to return to a school system that, despite the State's intervention, continues to exhibit severe dysfunction. In 1999, the State of Ohio reported that CCSD failed to meet a single one of its 18 performance criteria for public schools. State of Ohio, *1999 School District Report Card* at 150. Among students taking ninth grade proficiency tests, only 11.6 percent of CCSD students passed, compared to 55.6 percent statewide and 22.4 percent of students in districts of similar size, poverty, geography, and tax wealth. *Id.* at 151. The following year, CCSD met zero out of 27 state performance standards. Janet Tebben and Mark Vosburgh, "Cleveland Schools Score Lowest in State," *Cleveland Plain Dealer* (Dec. 23, 1999) at 1-A. The graduation rate for CCSD students in 1999 was a shocking 32.6 percent. Affidavit of Francis H. Rogers III, ¶ 2. The district court tacitly acknowledged the dislocation that the program's disruption would inflict, not only for children in the program but for the school district that would have to absorb them, when it stayed most of its injunction only four days after issuing it on the eve of the 1999-2000 school year.

Discontinuing the program also would portend nationwide consequences, for school choice of varying forms appears to hold potential to close the vexing academic gap between low-income and minority youngsters and their more advantaged counterparts. See, e.g., Peterson and Hassel, eds., *Learning from School Choice* (1998)

(reporting, *inter alia*, very encouraging results from the Milwaukee and Cleveland school choice programs). Not only will progress for children in the program come to a halt if the Court fails to grant the Petition, but vital academic research on this promising educational reform will be arrested as well. See Affidavit of Diane Ravitch, Affidavit of Joseph P. Viteritti, Affidavit of Caroline Hoxby.

This Court recognized the equitable considerations at stake in this litigation when it granted a stay of the district court's injunction in 1999. The petitioner families, and thousands like them, were enormously grateful that this Court preserved the opportunity for their children to continue in the only good schools they have ever attended. But now they again face termination of the program and the demise of high-quality educational opportunities for their children. If that happens, the promise of *Brown v. Bd. of Educ.* will, for them, be unfulfilled. Whatever the ultimate outcome of this case, the program should not be discontinued without these families having their day in this Court.

II. A DIRECT SPLIT IN AUTHORITY EXISTS OVER THE CONSTITUTIONALITY OF SCHOOL CHOICE IN GENERAL AND THIS PROGRAM IN PARTICULAR THAT ONLY THIS COURT CAN RESOLVE.

A. A clear and direct conflict exists over the constitutionality of school choice. In *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 782 n.38 (1973), this Court expressly reserved the question of the constitutionality of "some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution

benefited." Although the Court has addressed that question repeatedly in the intervening 28 years (see Part II-B, *infra*), it has not done so in the explicit context of school choice. As a consequence, courts have reached different constitutional conclusions over programs whose common denominator is allowing parents to spend public funds to secure education for their children in private schools. Given the urgent need to find ways to deliver educational opportunities to economically disadvantaged children, this Court should resolve the conflict.

Most glaring is the split between the Sixth Circuit below and the Ohio Supreme Court over the constitutionality of the Cleveland Pilot Project Scholarship Program. Two courts of equal dignity reaching opposite results over the constitutionality of the same statute produces intolerable conflict. This Court has recognized that such extraordinary circumstances make a case particularly appropriate for review. See, e.g., *Ward v. Illinois*, 431 U.S. 767 (1977); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

The split in authority over the constitutionality of the scholarship program at issue here mirrors a larger split over the constitutionality of school choice. Three court decisions line up with the Ohio Supreme Court. In *Campbell v. Manchester Bd. of School Directors*, 641 A.2d 352 (Vt. 1994), the Vermont Supreme Court ruled that the First Amendment permitted the State to reimburse parents for tuition paid to religious schools in a school district that does not maintain its own public schools but instead provides tuition for the public or private school of the parents' choice. In *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 525 U.S. 997 (1998), the Wisconsin Supreme Court upheld against First Amendment challenge a school choice program that, like the Cleveland Pilot Project Scholarship Program, allows economically

disadvantaged children to use public funds to pay for private school tuition. In *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921 (1999), the Arizona Supreme Court sustained under the First Amendment a state income tax credit for contributions to private scholarship programs.[4]

On the other hand, two courts agree with the Sixth Circuit that school choice is unconstitutional. The Maine Supreme Court and the U.S. Court of Appeals for the First Circuit both rejected claims by families seeking reimbursement for religious school tuition in a program similar to Vermont's on the grounds that including religious schools among the range of options would violate the establishment clause. *Bagley v. Raymond School Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999). As illustrated on the chart on page 13, these cases present a direct and irreconcilable conflict over the constitutionality of school choice.

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[4] Although *Kotterman* involved tax credits whereas the other programs involve tuition assistance, the conflicting outcomes reflect a split in authority because this Court has applied the same conceptual framework to tax benefits and tuition payments. Compare *Mueller v. Allen*, 463 U.S. 388 (1983) (tuition tax deductions), with *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) (tuition assistance).

SPLIT IN AUTHORITY OVER SCHOOL CHOICE

Citation	*Campbell v. Manchester Bd. of School Directors*, 641 A.2d 352 (Vt. 1994)	*Jackson v. Benson*, 578 N.W.2d 602 (Wis), *cert. denied*, 525 U.S. 997 (1998)	*Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999)	*Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000)	*Kotterman v. Killian*, 972 P.2d 602 (Ariz), *cert. denied*, 528 U.S. 921 (1999)	*Bagley v. Raymond School Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 528 U.S. 947 (1999)	*Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999)
Program Description	"Tuitioning" program allows students to choose public schools in adjacent districts or private schools at public expense.	Program provides full tuition for low-income children to attend private religious or secular schools.	Cleveland Pilot Project Scholarship Program (see Statement of Facts)	Same.	Dollar-for-dollar tax credit up to $500 for contributions to scholarship funds that provide tuition for private and religious schools.	"Tuitioning" program allows students to choose public schools in adjacent districts or private schools at public expense.	Same.
Federal Constitutional Issue	Is religious school reimbursement constitutional under First Amendment?	Does the program violate the First Amendment?	Does the program violate the First Amendment?	Same.	Does the program violate the First_ Amendment?	Does the exclusion of religious schools violate the First Amendment?	Same.
Controlling Precedent(s)	*Mueller, Witters*	*Mueller, Witters, Zobrest, Agostini*	*Mueller, Witters, Zobrest, Agostini*	*Nyquist*	*Mueller, Witters, Zobrest, Agostini*	*Nyquist*	*Nyquist*
Outcome	Tuitioning for religious schools permissible under First Amendment.	Milwaukee Parental Choice Program upheld under First Amendment.	Cleveland Pilot Scholarship Program upheld under First Amendment.	Cleveland Pilot Scholarship Program struck down under First Amendment.	Scholarship tax credits affirmed under First Amendment.	Religious school exclusion is permissible because inclusion of religious schools would violate First Amendment.	Same.
School Choice Constitutional?	**CONSTITUTIONAL**	**CONSTITUTIONAL**	**CONSTITUTIONAL**	**UNCONSTITUTIONAL**	**CONSTITUTIONAL**	**UNCONSTITUTIONAL**	**UNCONSTITUTIONAL**

The conflict bodes serious real-world ramifications. Every school choice program that includes private schools among its range of options, regardless of its contours, is subjected to legal challenge, which leaves the beneficiary families in a state of constant turmoil and anxiety at the very time they should be concentrating on their children's education. The instant litigation illustrates the constant and wrenching tumult: the program was enacted in 1995; it was challenged in state court in 1996; it was upheld by the state trial court; it was struck down by the state appellate court; that decision was stayed by the Ohio Supreme Court, which subsequently invalidated the program principally on state constitutional grounds but upheld it against a First Amendment and other state constitutional challenges; the Ohio Legislature re-enacted the program to cure the state constitutional deficiency; the federal district court enjoined the program; it subsequently stayed much of its own injunction; this Court stayed the entire injunction; the trial court struck down the program; and the Sixth Circuit affirmed. Other school choice programs in Wisconsin, Arizona, Illinois, and Florida have been subjected to similar disruption, all because the applicable constitutional rules remain uncertain.

Moreover, constitutional uncertainty is rife in the context of legislative and initiative battles over school choice. In the Pennsylvania legislature, for instance, a constitutional point of order was raised against a school choice plan in 1991, leading to the bill's demise because a majority deemed it unconstitutional.[5] Reflecting the uncertainty, the legislature reversed its position when a constitutional point of order was raised against another

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[5] *Commonwealth of Pa. Legis. Jrnl.*, Dec. 11, 1991, 175th Sess. at 1928.

school choice proposal only four years later.[6] Constitutional arguments have been raised in legislative battles over school choice in Congress[7] and in states including California,[8] Colorado,[9] Minnesota,[10] Indiana,[11] Florida,[12] and New Mexico;[13] as well in recent initiative campaigns in Michigan[14] and California.[15] As one newspaper cogently observed during a recent school choice battle in Illinois, "Generally lawmakers don't like to vote on bills that are surrounded by constitutional questions."[16] Legislative interest in school choice abounds, but constitutional

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[6] *Commonwealth of Pa. Legis. Jrnl.*, June 16, 1995, 179th Sess. at 1464.

[7] See David Vise, "District School Voucher Bill Gets Congressional Approval," *Washington Post* (May 1, 1998) at C1 (debate over a school choice program for the District of Columbia that was passed by Congress but vetoed by President Bill Clinton).

[8] See Jon Matthews, "School Voucher, Welfare-Limits Bills Rejected," *Sacramento Bee* (July 4, 1996) at A3.

[9] See "Under the Dome," *Denver Post* (Apr. 16, 1996) at B5.

[10] See Rob Hotakainen, "Legislative Preview; School Vouchers," *Star Tribune* (Jan. 14, 1996) at 16A.

[11] Jenny Lebalme and Larry MacIntyre, "Senate Passes Remediation Measure," *Indianapolis Star* (Mar. 7, 1995) at B3.

[12] Larry Kaplow, "Panel Wary of Private School Choice Plan," *Palm Beach Post* (Feb. 8, 1995) at 5B.

[13] See Lois Fecteau, "Vouchers for Schools Deep-Sixed," *Albuquerque Journal* (Feb. 5, 1998) at A10.

[14] See Tom Bray, "Myths and Facts About Proposal 1," *Detroit News* (Oct. 18, 2000) at 13.

[15] See Brian Bennett, "Proposition 38 – Yes," and Wayne Johnson, "Proposition 38 – No," *Sacramento Bee* (Oct. 27, 2000) at B9.

[16] Ray Serati, "School Vouchers Getting Another Vote in the House," *State-Journal-Register* (Apr. 24, 1995) at 7.

confusion limits the realm of the possible. This case presents the appropriate vehicle by which this Court can clarify the applicable parameters and remove the constitutional cloud hovering over this promising educational reform.

B. The decision below conflicts with the applicable and most recent precedents of this Court. This Court repeatedly has set forth the principles applicable to direct and indirect forms of financial assistance that may be used in religious schools. The Sixth Circuit failed to follow the applicable precedents, demonstrating further the necessity for this Court to apply its recent teachings in the specific context of parental choice.

This Court recently has observed that "our Establishment Clause law has 'significantly changed' " over the past two decades. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Specifically, "What has changed . . . is our understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. Nonetheless, the court below found this case controlled by *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973). See *Simmons-Harris v. Zelman*, 234 F.3d at 958 (A. 27) ("*Nyquist* governs our result"). Whether or not *Nyquist* remains good law, it could never control this case because the Court expressly left open the question presented here; to wit, "a case involving some form of public assistance (*e.g.* scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782 n.38.[17]

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[17] This Court's understanding of the narrow scope of *Nyquist* is underscored by its affirmance shortly thereafter of *Americans United for the Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.), *aff'd*, 434 U.S. 803 (1977),

The Court repeatedly has addressed such cases in the intervening 28 years, consistently sustaining such public assistance. As Justice Lewis Powell, the author of *Nyquist*, subsequently described the rule in *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 490-91 (1986) (Powell, J., concurring), "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate" the establishment clause. There is no question that the beneficiary class here – economically disadvantaged Cleveland schoolchildren – is defined without reference to religion. Likewise, public, private, and religious schools all are invited to participate. Plainly, as in *Agostini*, 521 U.S. at 231, "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."

Last Term, this Court in *Mitchell v. Helms*, 530 U.S. 793 (2000), reaffirmed the significance of neutrality in sustaining aid to students in religious schools. Additionally, Justices O'Connor and Breyer further illuminated the distinction between "a per-capita school-aid program and a true private-choice program." *Id.* at 842 (O'Connor, J., concurring). The Sixth Circuit mistakenly concluded that the program here entails " 'direct monetary subsidies to religious organizations' " *Simmons-Harris v. Zelman*, 234 F.3d at 960 (quoting *Mitchell*, 530 U.S. at 844 (O'Connor, J., concurring)). That is clearly incorrect: the program unquestionably falls within the category involving a true private-choice program, for "[a]ny aid . . . that flows to religious institutions does so only as a result of the genuinely independent and private

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upholding the Tennessee Student Assistance Program, which resembles in operation the scholarship program at issue here.

choices of aid recipients." *Witters*, 474 U.S. at 488. Both the neutrality and true private-choice tests are readily satisfied on the face of the challenged program.

The Sixth Circuit managed to circumvent these principles only by indulging a factual finding that this Court has deemed irrelevant: that a substantial majority of the participating schools are religious, and that 96 percent of the students in the program are enrolled in religiously affiliated schools. *Simmons-Harris v. Zelman*, 234 F.3d at 959 (A. 29). In *Mueller v. Allen*, 463 U.S. 388, 400-01 (1983), the plaintiffs made the same argument against a tuition tax credit program that yielded virtually identical statistical results. This Court's response was unambiguous: "We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* at 401. Accord, *Agostini*, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends upon the number of sectarian school students who happen to receive the otherwise neutral aid").[18]

Also as in *Mueller*, where the plaintiffs contended that the nature of the program – specifically, the fact that few public school families incurred covered expenses, thereby skewing the program toward religion – so too did the court below find that the program "has the impermissible effect of promoting sectarian schools" because the amount of the scholarship is too low to attract suburban public schools and nonsectarian private schools into the

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[18] In stark contrast to the Sixth Circuit, the Wisconsin Supreme Court applied these precedents to conclude that "[t]he percentage of program funds eventually paid to sectarian private schools is irrelevant to our inquiry." *Jackson v. Benson*, 578 N.W.2d at 619 n.17.

program. *Simmons-Harris v. Zelman*, 234 F.3d at 959. With respect to suburban public schools, however, the court's conclusion was based on an erroneous assumption as suburban public schools participating in the program would not receive only $2,250; rather, they would receive the amount of the scholarship *plus* the State's per-pupil aid contribution. See Ohio Rev. Code §§ 3317.03(I)(1), 3327.061, 3317.08(A)(1). And with respect to nonsectarian private schools, not one shred of evidence was introduced into the record below to support the court's theory that "tuition restrictions mandated by the statute" disadvantage nonsectarian private schools more than religious schools. *Simmons-Harris*, 234 F.3d at 959. The only support for this crucial factual finding is a law review article. Moreover, private nonsectarian schools are eligible to become community schools and receive substantially greater tuition ($4,518 for community schools versus $2,500 for scholarship schools) for the very same students. As the record demonstrates, that is exactly what several nonsectarian private schools did, leaving mostly religious schools in the scholarship program. See Declaration of David P. Zanotti. In other words, it is not the design of the scholarship program that led to a concentration of religious schools, but rather the relative attractiveness of the community school program, which is open to nonsectarian private schools but not to religious schools. By contrast, religious schools are not eligible to become community schools, and may only participate in the stingier scholarship program. Hence, the court below falsely portrayed discrimination *against* religious schools as discrimination *in favor* of them. All of this underscores the wisdom of the Court's rule in *Mueller* and *Agostini* that the constitutionality of a facially neutral program cannot

depend upon the independent choices of third parties, whether parents or schools.[19]

The Court of Appeals' error in this regard was compounded by its holding that other school choice options operating in Cleveland are "at best irrelevant," *Simmons-Harris v. Zelman*, 234 F.3d at 958 (A. 25), despite the fact that the overwhelming majority of Cleveland children in schools of choice are attending public schools, and that all financial incentives operate in favor of public school choice.[20] Contrast *Jackson v. Benson*, 578 N.W.2d at 614 n.9 (the school choice program "merely adds religious schools to a range of pre-existing educational choices available to [Milwaukee] children"). Again, the Sixth Circuit ignores this Court's admonition that the proper analytical framework is "the nature and consequences of the program *viewed as a whole.*" *Witters*, 474 U.S. at 492 (Powell, J., concurring) (citing *Mueller*, 463 U.S. at 397-400); accord *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 850 (1995) (noting competition from non-

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[19] Another reason for this Court's rule is that the statistics can change from year to year. In Milwaukee, after the litigation ended, new schools began opening, and both the number and percentage of nonsectarian schools increased substantially. See Declaration of Dr. Howard Fuller, ¶ 18.

[20] Scholarship children in private or religious schools receive $2,250 in state funds, or 90 percent of tuition, while students attending community schools receive full tuition at a minimum of $4,518 and students choosing magnet schools receive full tuition at $7,097. Scholarship students are not eligible for tutorial assistance grants. Of Cleveland schoolchildren enrolled in schools of choice, 16,184 (73.5 percent) attend public magnet schools; 2,087 (9.5 percent) attend public community schools; 3,637 (16.5 percent) attend religious schools; and 128 (.5 percent) attend private nonsectarian schools. See Affidavit of Caroline Hoxby, ¶¶ 4c-4d; Greene at 105.

religious publications); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) ("part of a general government program"). The magnet school, community school, and scholarship programs are a single continuum of school choice programs; the fact that they were adopted one step at a time should not alter the constitutional analysis.

Tellingly, of the seven appellate judges in the dispositive state and federal proceedings who reached the First Amendment issues raised by the scholarship program – three on the Sixth Circuit and four on the Ohio Supreme Court – only two, the majority of the panel below, found the program unconstitutional.

Dissenting from the panel opinion, Judge James Ryan concluded that "*Nyquist* is simply inapposite to the appeal before us" and that "a reading of the Supreme Court's Establishment Clause cases decided since 1973 makes it unmistakably clear that the voucher program passes constitutional muster." *Simmons-Harris v. Zelman*, 234 F.3d at 963 (Ryan, J., concurring in part and dissenting in part) (A. 39). Likewise, after extensive analysis, the Ohio Supreme Court concluded that the program satisfies this Court's establishment clause precedents. *Simmons-Harris v. Goff*, 711 N.E.2d at 207-11. This considerable disagreement, and the extent to which the Sixth Circuit strayed from this Court's well-established principles, underscores the compelling need for this Court to definitively address the issues raised in this case.

III. THE SIXTH CIRCUIT'S REFUSAL IN THIS CASE TO GIVE PRECLUSIVE EFFECT TO THE OHIO SUPREME COURT'S PRIOR RULING, OR TO CERTIFY THE QUESTION, CONTRADICTS THIS COURT'S PRECEDENTS AND CONTRAVENES PRINCIPLES OF FEDERALISM.

The action of a 2-1 panel of a federal court of appeals striking down an essential state program designed to ameliorate severe conditions of educational inequity – after the program had been sustained by the highest court of that state in a challenge by the same parties presenting the same federal constitutional question – presents an untenable usurpation of the role of state courts in our federal judicial system. Federal law and this Court's precedents provide a ready mechanism to avoid such conflicts between state and federal courts, which the petitioners sought to invoke, but the courts below refused to apply. This case presents a situation analogous to the extraordinary circumstances invoking this Court's original jurisdiction when states and the federal government are engaged in litigation against each other: a conflict between state and federal court rulings, where a federal court has derogated its responsibility to accord proper deference and comity to a state court – a conflict that begs this Court's resolution.

At the same time, the petitioner families and the State of Ohio have been required to endure repetitive litigation, raising identical claims and subjecting the school choice program and its beneficiaries to two or more additional years of uncertainty. That is, of course, precisely the type of hardship the doctrine of collateral estoppel seeks to avoid.

Under Ohio law, respondents' establishment clause claim is precluded by the Ohio Supreme Court's prior rejection of the same claim in *Simmons-Harris v. Goff*, 711

N.E.2d 203 (Ohio 1999). In rejecting petitioners' collateral estoppel claim, the Sixth Circuit therefore disregarded not only the dictates of the Full Faith and Credit Act, 28 U.S.C. § 1738, but also this Court's admonition that "[f]ederal courts may not 'employ their own rules . . . in determining the effect of state judgments,' but must accept the rules chosen by the State from which the judgment is taken." *Matsushita Electrical Co. v. Epstein*, 516 U.S. 367, 373 (1996) (citing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982)); see, e.g., *Migra v. Warren City School District Bd.*, 465 U.S. 75, 81 (1984). This failure to apply Ohio law and thus accord preclusive effect to the Ohio Supreme Court's rejection of the same establishment clause claim advanced in this litigation is a direct assault on federalism that departs from this Court's interpretation of the Full Faith and Credit Act, a vital tool of comity and finality, and warrants this Court's review. See S. Ct. R. 10(c).

The Sixth Circuit rejected petitioners' collateral estoppel argument because it concluded that the Ohio Supreme Court's resolution of the establishment clause claim was not "essential to the judgment" in *Simmons-Harris v. Goff*. Petitioners do not dispute that under Ohio law a determination must be essential to the judgment for collateral estoppel to apply. See, e.g., *Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 985 (Ohio 1983). The Sixth Circuit, however, went awry and departed from the dictates of the Full Faith and Credit Act when it failed to apply Ohio law to determine the meaning of the "essential to the judgment" test.

The crucial question with respect to the "essential to the judgment" test is this: Does one look to what was essential to the actual judgment issued by a court or does one instead look to the narrowest judgment that court could have chosen to issue?

Under Ohio law, the first view prevails. The Ohio Supreme Court has in the past extended the scope of its judgments beyond the minimum number of issues necessary to dispose of a case. See, e.g., *Bahm v. Pittsburgh & Lake Erie Rd. Co.*, 217 N.E.2d 217, 220 (Ohio 1966); *Mestetzko v. Elf Motor Co.*, 165 N.E. 93, 94 (Ohio 1929); see also *Richards v. Market Exchange Bank Co.*, 90 N.E. 1000, 1004 (Ohio 1910). It has done this for many reasons, including its interest in judicial economy and the desire to avoid duplicative litigation.

The Sixth Circuit, however, looked to federal law to embrace the latter view. It cited to this Court's decision in *Lambrix v. Singletary*, 520 U.S. 518, 522-24 (1997), for the proposition that "[a] determination is not essential to the judgment if the judgment *could be supported* by an adequate and independent state ground" (emphasis added). This key proposition in the Sixth Circuit's decision, however, is nowhere to be found in Ohio law.[21] The distinction between these two views becomes crucial for purposes of this case when one analyzes the actual judgment in *Simmons-Harris v. Goff*. The Ohio Supreme Court's judgment, at a minimum, consisted of two distinct elements: (1) a provision of the Scholarship Program, Ohio Code Rev. § 3313.977(A)(1)(d), was struck down as violating the First Amendment's establishment clause and severed from the rest of the statute; and (2) the remainder of the Scholarship Program was stricken for violating the Ohio Constitution's single-subject rule. Whatever the status of the other issues addressed in *Simmons-Harris*, it is simply incontestable that the Ohio

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[21] The Sixth Circuit also misinterpreted this Court's opinion in *Lambrix*, which does not deal with preclusion but rather with this Court's jurisdiction to review state court judgments.

Supreme Court intended for its judgment to extend to its holding that one of the selection criteria included in the Scholarship Program statute violated the federal establishment clause. The Court explicitly severed § 3313.977(A)(1)(d) from the rest of the Scholarship Program for this reason. See *Simmons-Harris*, 711 N.E.2d at 211 ("We hold that R.C. 3313.977(A)(1)(d) does violate the Establishment Clause and sever it from the remainder of the statutory scheme"). Under any reasonable reading of the Ohio Supreme Court's decision, it must be concluded that the court's holding with respect to the severed provision was part of its judgment.[22] By using the term "sever," the Court was taking a concrete action with respect to the Scholarship Program; the notion of severing a statutory provision in dicta would be nonsensical and, to petitioners' knowledge, unprecedented.[23] An

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[22] While the scope of the Ohio Supreme Court's judgment is normally defined by the syllabi of its cases, see *Migra v. Warren City School District Bd.*, 465 U.S. 75, 86 n.8 (1984), the Ohio Supreme Court, unusually, did not issue a syllabus in *Simmons-Harris*. Therefore, pursuant to Ohio law, "the opinion of the [Ohio Supreme Court] must be analyzed in order to disclose the *ratio decidendi*." *State v. Hoffman*, 80 N.E.2d 235, 238 (Ohio Ct. App. 1947).

[23] The Sixth Circuit's claim that "the Ohio Supreme Court held that the 1995 school voucher program was enacted in violation of the one-subject rule of the Ohio Constitution, and on that basis, ordered the program in its entirety 'stricken' from the Ohio statute books" is patently false. In this portion of its opinion, the Ohio Supreme Court struck the Scholarship Program minus the unconstitutional student selection provision. That provision was not stricken on the basis of the single-subject rule as it had already been severed from the statute earlier in the opinion, and it is impossible to strike what has already been severed. Given its view of what the "essential to the judgment" test entails, the Sixth Circuit's statement is probably best read to reflect its view that the Ohio Supreme

Ohio Court of Common Pleas, in fact, has already concluded that the invalidation of the student selection provision on establishment clause grounds constituted part of the Ohio Supreme Court's judgment. See Decision and Entry Overruling Plaintiffs' Motion for Reasonable Attorneys Fees at 5 (A. 167).[24]

Once it is understood that the Ohio Supreme Court's judgment encompasses its decision to strike down § 3313.977(A)(1)(d) as violating the establishment clause, it becomes apparent that the court's holding that the remainder of the Scholarship Program was consistent with the establishment clause was essential to its judgment. Under Ohio law, an unconstitutional provision of a statute can only be severed if "the constitutional and unconstitutional parts [are] capable of separation so that each may be read and may stand by itself." *Geiger v. Geiger*, 160 N.E. 28, 33 (Ohio 1927). Thus, the Ohio Supreme Court was forced to determine that the remainder of the Scholarship Program was constitutional in order to hold only § 3313.977(A)(1)(d) unconstitutional and sever it from the remainder of the statute.

Had the Sixth Circuit actually applied Ohio law and analyzed the Ohio Supreme Court's opinion in *Simmons-Harris v. Goff*, it would have come to the conclusion that the resolution of the establishment clause claim was essential to the Ohio Supreme Court's judgment. But the Sixth Circuit instead applied the following principle: In

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Court's judgment *could have been based* entirely on single-subject grounds.

[24] Moreover, the Ohio Supreme Court characterized the scope of its judgment in *Simmons-Harris* as "affirm[ing] in part and revers[ing] in part" the judgment of the Court of Appeals. *Simmons-Harris*, 711 N.E.2d at 216. If, however, the Supreme Court's judgment solely consisted of its disposition of plaintiffs' single-subject claim, this statement does not make any sense.

determining what is essential to the judgment, one should not look to the Ohio Supreme Court's *actual judgment*, but rather *the narrowest judgment that the Ohio Supreme Court could have issued.*

The Sixth Circuit does not make any pretense that this principle is grounded in Ohio law; it does not cite a single Ohio case for this proposition. Instead, looking at the sources to which the Sixth Circuit referred, one can only conclude that the Sixth Circuit derived this principle from federal common law. But wherever it comes from, the Sixth Circuit's conclusion is flatly inconsistent with the only law that is relevant pursuant to the Full Faith and Credit Act and this Court's precedents: Ohio law.

The Sixth Circuit concluded its discussion of collateral estoppel by suggesting one other federal law ground for why respondents' establishment clause claim was not precluded: "Because Plaintiffs would not be able to obtain Supreme Court review of the Ohio Supreme Court's determination as to the Establishment Clause, such determinations cannot constitute collateral estoppel." As support for this proposition, the Sixth Circuit cited to this Court's decision in *California v. Rooney*, 483 U.S. 307, 311 (1987). *Rooney*, however, has nothing to do with either Ohio law or even the subject of preclusion but rather addresses the scope of this Court's jurisdiction. And if the Sixth Circuit meant to suggest that respondents cannot be constitutionally precluded from advancing a federal claim that could not have been reviewed by the U.S. Supreme Court, such a suggestion is false: this Court has already decided that a federal claim may be precluded by state court decisions that could not have been reviewed by this Court. See, e.g., *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

While petitioners believe that respondents' establishment clause claim is precluded under Ohio law, we nonetheless suggested below that if any doubt existed the proper recourse was to certify the question to the Ohio Supreme Court pursuant to Ohio Supreme Court Rule XVIII. Therefore, should this Court grant *certiorari* in this case and have doubts as the proper application of Ohio preclusion law, petitioners respectfully submit that certification is the appropriate mechanism for definitively answering this question. See *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974) (noting that certification saves "time, energy, and resources and helps build a cooperative judicial federalism"). Certification would be a particularly appropriate course of action in this case as it could avoid the unnecessary adjudication of an important constitutional question. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-76 (1997).

In determining whether respondents' establishment clause claim was precluded by the Ohio Supreme Court's decision in prior state court litigation, the Sixth Circuit did not apply Ohio law. Instead, it misapplied irrelevant propositions of federal law in rejecting petitioners' collateral estoppel claim. The Sixth Circuit therefore did precisely what this Court warned federal courts may not do in *Matsushita Electrical Co. v. Epstein*, 516 U.S. 367, 378 (1996): " 'employ [its] own rules . . . in determining the effect of state judgments,' [rather than] 'accept[ing] the rules chosen by the State from which the judgment is taken' " (citation omitted). Its decision thus conflicts with one of our nation's bedrock foundations of federalism and warrants this Court's review.

The Sixth Circuit decision invites the extension to civil litigation of the abuses of federal habeas corpus recently curbed by Congress. This Court in *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980) refused to allow such a

development in civil litigation, finding nothing in 42 U.S.C. § 1983 that "in any clear way suggests that Congress intended to repeal or restrict the traditional doctrines of preclusion." 449 U.S. at 97-98. As Professor Charles Alan Wright observes, "[T]he argument that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises, was found unsupported by authority, and to rest on what is 'hardly a legal basis at all . . . a general distrust of the capacity of state courts to render correct decisions on constitutional issues.' The Court made it clear it did not share this distrust." Wright, *Law of Federal Courts*, § 100A at 734 (5th ed. 1994).

Moreover, on an equitable level, respondents' multiple bites at the litigation apple subject the state and the beneficiaries of this program to uncertainty and hardship. They prevailed on these issues in the Ohio Supreme Court. That Court's judgment was correct and should be accorded the finality to which it is entitled.

CONCLUSION

This case presents in crisp, timely and urgent fashion one of the most important constitutional issues of our day, with tremendous ramifications for the hopes and aspirations of millions of economically disadvantaged schoolchildren. We respectfully ask this Court to grant the Petition.

Respectfully submitted,

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Nos. 00-3055/00-3060/3063.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

234 F.3d 945; 2000 U.S. App. LEXIS 31367; 2000 FED App. 0411P (6th Cir.)

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JUDGES:

Before RYAN, SILER, and CLAY, Circuit Judges. CLAY, J., delivered the opinion of the court, in which SILER, J., joined. RYAN, J., delivered a separate opinion concurring in part and dissenting in part.

OPINION BY

CLAY

OPINION:

CLAY, Circuit Judge. Defendants and Intervenors Dr. Susan Tave Zelman, *et al.*; Senel Taylor, *et al.*; and Hanna Perkins School, *et al.*, appeal from the order entered by the United States District Court for the Northern District of Ohio, enjoining on summary judgment the Ohio Pilot Project Scholarship Program on the ground that it violates the Establishment Clause of the First Amendment. For the following reasons, we **AFFIRM.**

I.

In 1995, Ohio's General Assembly adopted the Ohio Pilot Project Scholarship Program ("voucher program" or "the program") in response to an order by the United States District Court that placed the Cleveland School District under the direct management and supervision of the State Superintendent of Public Instruction due to mismanagement by the local school board. The voucher program covers any state school district that has been the subject of a federal court order "requiring supervision and operational management of the district by the state superintendent." Ohio Rev. Code § 3313.975(A). The program provides scholarships to children residing within the applicable district in grades kindergarten through eighth grade. *See* Ohio Rev. Code § 3313.975(C)(1). The program gives "preference to students from low-income families," defining them as those whose families' income

is less than 200% of the poverty line. *See* Ohio Rev. Code § 3313.978(A). "Scholarships may be awarded to students who are *not* from low-income families *only if* all students from low-income families have been given first consideration for placement." Cleveland Scholarship and Tutoring Program, Administration Procedures Manual, 1-11 (J.A. at 1358) (emphasis original). Over sixty percent of the children receiving scholarships in the program are from families with incomes at or below the poverty line.

The voucher program pays scholarships according to family income. The program requires participating private schools to cap tuition at $2500 per student per year and pays 90% of whatever tuition the school actually charges for low-income families; for other families, the State pays 75% of the school's tuition up to a maximum of $1875. *See* Ohio Rev. Code. §§ 3313.976(A)(8), 3313.978(A). Each scholarship for children attending a private school is payable to the parents of the student entitled to the scholarship. Ohio Rev. Code § 3313.979. Scholarship checks are mailed to the school selected by the parents, where the parents are required to endorse the checks over to the school in order to pay tuition.

Schools wishing to be designated as program participants eligible to enroll scholarship students must register with the voucher program. Private schools located within the boundaries of the Cleveland school district which meet the State's educational standards may participate. *See* Ohio Rev. Code § 3313.976(A)(1) and (3). Schools are required to follow the program's priority rules regarding the placement of students and may not discriminate on the basis of race, religion, or ethnic background; advocate

or foster unlawful behavior; or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion. *See* Ohio Rev. Code § 3313.976(A)(6). Public schools in districts adjacent to the district in which the voucher program is implemented may also register for the program and "receive scholarship payments on behalf of parents," but none of the public schools in districts adjacent to Cleveland have done so. Ohio Rev. Code § 3313.976(C). The checks for program participants at public schools are made out to the participating school district rather than to the parents. No public schools have registered for the program since its enactment.

For the 1999-2000 school year, 3,761 students enrolled in the program; 60% of the enrollees are from families at or below the poverty level. Of these, 3,632 (96%) are enrolled in sectarian schools. At one time in the course of the program, as many as 22% of the students enrolled in the program attended nonreligious schools. During the 1999-2000 school year, fifty-six schools registered to participate in the program; forty-six (82%) are church-affiliated. Program monies may be used by the participating schools for whatever purpose they deem appropriate; the voucher program does not place restrictions on the use of funds made available under the program.

The sectarian schools vary in their religious affiliation and approaches; however, the handbooks and mission statements of these schools reflect that most believe in interweaving religious beliefs with secular subjects. The sectarian schools also follow religious guidelines, including instruction in religion and mandated participation in religious services; interweaving of Christian doctrines with science and language arts classes; requiring

that "all learning take place in an atmosphere of religious ideals," St. Vincent de Paul School, Parent Handbook 11 (1999-2000); and designing educational scholarship in order "to make . . . faith become living, conscious, and active through the light of instruction . . . religious truths and values permeate the whole atmosphere of the school." Saint Rocco School, Parent-Student Handbook 1 (1999-2000). Other sectarian schools in the voucher program believe that "the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer, and Sanctifier," Saint John Nottingham Lutheran School, Parent Handbook 2 (1999-2000); and to require students to "pledge allegiance to the Christian flag and to the Savior for whose Kingdom it stands, One Savior crucified, risen and coming again with life and liberty for all who believe." Calvary Center Academy, Parent Student Handbook 24 (1999-2000).

In prior litigation, Doris Simmons-Harris, one of the Plaintiffs herein, brought a state court lawsuit challenging the constitutionality of the voucher program under multiple provisions of the Ohio Constitution, and under the Establishment Clause of the United States Constitution. On May 27, 1999, the Ohio Supreme Court issued a judgment in favor of Plaintiffs, holding that the 1995 voucher program had been enacted in violation of the one-subject rule of the Ohio Constitution, and "must be stricken" from the Ohio statute books. *See Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 711 N.E.2d 203, 216 (Ohio 1999). However, a majority of the justices rejected Plaintiffs' claims that the program violated the Establishment

Clause. 711 N.E.2d at 207-11, 218-19. Those justices reasoned that "[t]he *Nyquist* holding [had been] undermined" by subsequent cases and was thus no longer good law. *Id.* at 208. A concurring opinion noted that "[w]ith regard to the rest of the majority opinion [the section not dealing with the one-subject rule], . . . I find a number of the other assertions by the majority to be advisory in nature." *Id.* at 216 (Douglas, J., joined by Resnick and Sweeney, JJ., concurring in the judgment only). Since this case, the Ohio Legislature has re-enacted the voucher program in a manner remedying the one-subject problem; however, the 1999 program is in all relevant aspects, the same as the original pilot scholarship program enacted by the Legislature in 1995.

On July 20, 1999, Simmons Harris, the parent of a minor child enrolled in the Cleveland City School District for the 1999-2000 school year; Marla Franklin, a teacher in the Lorain City School District; and Steven Behr, pastor of Our Savior/Nuestro Salvado Church in Lorain, Ohio, filed suit in Case No. 1:99cv1740, against Defendant Dr. Susan Tave Zelman in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education, seeking to enjoin a portion of the program on the ground that it violated the Establishment Clause of the First Amendment. On July 29, 1999, Sue Gatton, chair of Citizens Against Vouchers; Mary Murphy, a teacher in the Cleveland City School District; Michael Debose, a pastor in Cuyahoga County, Ohio; Cheryl Debose and Glenn Altschuld, Ohio Taxpayers; and Deidra Pearson, the parent of a child enrolled in the Cleveland City School District, filed suit in Case No. 1:99cv1818 against

Defendants Dr. Susan Tave Zelman, in her official capacity as Superintendent; the State of Ohio through its General Assembly, Governor and other agents; and Saundra Berry, in her official capacity as Program Administrator of the Ohio Pilot Scholarship Program, seeking the same injunctive relief as in Case No. 1:99cv1740.

Proposed Intervenors Senel Taylor, Johnnietta McGrady, Christine Suma, Arkela Winston, and Amy Hudock, on their own behalf and as natural guardians of their respective children, filed an answer to Simmons-Harris' complaint on July 27, 1999. Proposed Intervenors Hanna Perkins School, Ivy Chambers, Carol Lambert, Our Lady of Peace School, Westpark Lutheran School Association, Inc., Lutheran Memorial Association of Cleveland, and Delores Jones, filed an answer to Simmons-Harris' complaint on August 2, 1999.

On August 13, 1999, the district court held a preliminary injunction hearing in both cases, and on August 24, 1999, granted Plaintiffs the injunctive relief sought. In the same order, the district court consolidated the two cases, and found that the Ohio Supreme Court's decision in *Simmons v. Goff*, 86 Ohio St.3d 1, 711 N.E.2d 203 (Ohio 1999), did not preclude federal consideration of the constitutional challenge to the voucher program because the Ohio court's decision rested on a state ground which independently supported its resolution of the case. Thereafter, on August 27, 1999, the district court granted in part Defendants' motion for a stay of the preliminary injunction.

On August 24, 1999, the same day that the district court granted Plaintiffs' motion for a preliminary injunction, the State and the two intervening Defendants appealed that decision to this Court. After the district court's August 27, 1999, order granting a limited stay of its preliminary injunction, all Defendants filed revised briefs with this Court, appealing the preliminary injunction with regard to students who were new to the voucher program – i.e., the portion of the preliminary injunction not stayed by the district court's August 27, 1999 order. While those appeals were pending, the State filed a motion for a stay of the preliminary injunction with the United States Supreme Court, which the Supreme Court granted by a vote of 5-4 on November 5, 1999, pending this Court's final disposition of the entire appeal. *See Simmons-Harris v. Zelman*, 145 L.Ed.2d 346, 120 S. Ct. 443 (1999). Thereafter, this Court entered an order on November 15, 1999, concluding that the Supreme Court's decision granting the State's motion for a stay rendered moot Defendants' pending motions for a stay in this Court. The case proceeded in the district court on an expedited basis.

On October 15, 1999, all parties stipulated that the handbooks, mission statements and brochures of the schools participating in the Cleveland scholarship program are "authentic, speak for themselves, have been made available to the parents of the scholarship students and are not false or misleading. Some of these documents however may not accurately reflect admission standards that had to be revised." Plaintiffs and Defendants both filed motions for summary judgment on November 1, 1999.

On November 29, 1999, the district court denied Intervenor Taylor's motion to have the following question certified to the Ohio Supreme Court: "Does Ohio law give preclusive effect to the resolution of the Establishment Clause claim in *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 711 N.E.2d 203 (Ohio 1999)?"

The district court granted Plaintiffs' motion for summary judgment on December 20, 1999, finding that the voucher program violated the Establishment Clause; enjoined Defendants from administering the program; and denied Defendants' motion for summary judgment. *See Simmons-Harris v. Zelman*, 72 F.Supp.2d 834, 836 (N.D.Ohio 1999). The court stayed its summary judgment order with Plaintiffs' consent pending review by this Court. Defendants and Intervenors appealed to this Court on January 12, 2000.

II.

We recognize the significance that this issue holds for many members of our society. The issue of school vouchers has been the subject of intense political and public commentary, discussion, and attention in recent years, and we would be remiss if we failed to acknowledge the seriousness of the concerns this case has raised. We do not, however, have the luxury of responding to advents in educational policy with academic discourse on practical solutions to the problem of failing schools; nor may we entertain a discussion on what might be legally acceptable in a hypothetical school district. We may only apply the controlling law to the case and statute before us.

The courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another. The design or specifics of a program intended to remedy the problem of failing schools and to rectify educational inequality must be reserved to the states and the school boards within them, with one caveat: the proposed program may not run afoul of the freedoms guaranteed to all citizens in the Constitution. In other words, the determinations of states and school boards cannot infringe upon the necessary separation between church and state. We therefore consider the program presented before us under the controlling precedents of the United States Supreme Court and this Court to determine whether such infringement has occurred.

This Court reviews the district court's grant of summary judgment *de novo*. *See Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 376 (6th Cir.1999). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no genuine issue of material fact when the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion. . . . " U.S. Const., amend. I. In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105

(1971), the Supreme Court set forth the following test to determine whether a statute passes muster under the Establishment Clause: 1) the statute must have a secular legislative purpose; 2) the principal or primary effect of the statute must be one that neither advances nor inhibits religion; and 3) the statute must not foster excessive entanglement with religion. If a statute fails any portion of this test, it violates the Establishment Clause. *Id.* The Supreme Court has applied the *Lemon* test regularly in the context of schools and education. *See, e.g., Kiryas Joel Sch. Dist. v. Grumet,* 512 U.S. 687, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994) (drawing a separate school district for one religion violates the Establishment Clause); *Stone v. Graham,* 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1989) (posting Ten Commandments on walls of public school violates Establishment Clause); *Bowen v. Kendrick,* 487 U.S. 589, 101 L. Ed. 2d 520, 108 S. Ct. 2562 (1988) (holding that Establishment Clause does not prevent religious organizations from participating in federally funded program); *Edwards v. Aguillard,* 482 U.S. 578, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987) (overturning statute which required the teaching of Creationism in public schools); *Aguilar v. Felton,* 473 U.S. 402, 87 L. Ed. 2d 290, 105 S. Ct. 3232 (1985) (paying public school employees to teach in parochial school violates the Establishment Clause), *overruled by Agostini v. Felton,* 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997); *Grand Rapids Sch. Dist. v. Ball,* 473 U.S. 373, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1985) (finding a shared time program to be a violation of Establishment Clause), *overruled by Agostini v. Felton,* 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997); *Mueller v. Allen,* 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983) (permitting

taxpayers to deduct from state income tax expenses incurred in sending children to parochial schools does not violate Establishment Clause); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 49 L. Ed. 2d 179, 96 S. Ct. 2337 (1976) (finding no violation of Establishment Clause in providing government aid to both public and private universities).

The Supreme Court and individual justices have introduced variations on the *Lemon* test in other contexts. *See Lee v. Weisman*, 505 U.S. 577, 592-98, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) (using coercion test developed by Justice Kennedy to hold that school could not provide for nonsectarian prayer to be given at graduation by school-selected clergyman); *County of Allegheny v. ACLU*, 492 U.S. 573, 594-602, 655-79, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) (using two-part test developed by Justice O'Connor – Establishment Clause is violated when 1) government is excessively entangled with religion, or 2) government endorses or disapproves of religion – as part of the *Lemon* test regarding government displays of objects with religious connotations; introducing Justice Kennedy's two-part coercion test – 1) government may not coerce participation in religion, and 2) government may not directly benefit religion – in his concurrence); *Wallace v. Jaffree*, 472 U.S. 38, 56 & n. 42, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985) (using Justice O'Connor's two-part test as part of the *Lemon* analysis and finding it appropriate to determine whether the government's purpose is to endorse or disapprove of religion); *Lynch v. Donnelly*, 465 U.S. 668, 687-94, 79 L. Ed. 2d 604, 104 S. Ct. 1355 (1984) (introducing Justice O'Connor's two-part test).

In *Agostini v. Felton*, 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997), the Court reaffirmed the importance of the *Lemon* test in Establishment Clause cases involving school aid, but noted that the entanglement prong could be considered as an aspect of the effects inquiry. *Agostini* found "three primary criteria" used by the Court in evaluating whether government aid has the effect of advancing religion: whether the statute or programs in question "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234.

The Supreme Court has not overturned or rescinded the *Lemon* test even as it has used its framework to shape differing analyses. Although in *Agostini*, the Court articulated the primary criteria it would utilize to determine whether a government-aid program impermissibly advanced or endorsed religion, the Court has not necessarily limited itself to considering solely those criteria. Rather, it seems evident that the *Agostini* Court illustrated the *Lemon* test's flexibility and its evolution from the relatively rigid three-part test to an approach in which the varying components of a particular program or statute are analyzed with regard to their impact on, in the context of schools, the relevant students or communities. We therefore look to these components as aspects of the proper analysis under *Lemon*, but acknowledge that precedent does not limit itself to only these components should other components previously utilized by the Court be relevant, such as coercion of citizens, endorsement of religion, and direct benefit to religion. *See Mitchell v. Helms*, 530 U.S. 793, ___, 147 L. Ed. 2d 660, 120 S. Ct. 2530, 2556 (2000) (O'Connor, J., concurring) (finding that

Agostini represents a general framework for approaching questions concerning neutral school-aid programs but recognizing that these type of cases depend on the particular facts of each case).

Of the cases which follow *Lemon*, we find the most persuasive, in that it is on point with the matter at hand, to be *Committee for Public Education v. Nyquist*, 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973). In *Nyquist*, a New York State statute established, among other aid, a tuition grant program which provided for partial tuition reimbursement to low-income parents whose children attended private elementary or secondary schools. *See id.* at 761-70. The tuition reimbursement plan applied to parents of children who attended any private school, not solely sectarian schools, and was limited to 50% of tuition paid. *Id.* at 764. At the time the plan was challenged, nearly 20% of New York's school-age children attended nonpublic schools, and approximately 85% of these schools were sectarian. *Id.* at 768. The *Nyquist* Court noted that although "the characteristics of individual schools may vary widely from [the] profile," institutions which qualified for assistance under the statute were ones that included religious instruction and requirements as part of their academic curriculum. *See id.* at 767-68.

Following *Lemon*, the *Nyquist* Court found that the New York statute passed the first prong of the *Lemon* test – whether the statute had a secular purpose – because the tuition reimbursement program promoted pluralism and diversity among New York's public and private schools, and alleviated concern that the State's overburdened public schools would be harmed if a large number of children who had previously been attending private schools

decided to return to the public schools. *See* 413 U.S. at 773. The Court did "not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren." *Id.*

Under the second prong of the *Lemon* test – that the statute neither advance nor inhibit religion – the New York statute did not fare as well. The Court next found that the New York reimbursement program failed because "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 413 U.S. at 780. The Court opined that the fact that program grants were delivered to parents rather than schools was "only one among many factors to be considered." *Id.* at 781. The Court rested its analysis on the premise that there had been " 'no endeavor to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.' " *Id.* at 783 (quoting *Lemon*, 403 U.S. at 613). "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools." *Id.* The Court noted that "while the other purposes for that aid – to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools – are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.*

The *Nyquist* Court also recognized and discarded the state's arguments that it was of controlling significance that New York's program called for reimbursement of tuition already paid, thus ensuring that the parent is free to spend that tuition money in any manner he or she sees fit. 413 U.S. at 785-86. "[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated. . . . Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same." *Id.* at 786. The Court also rejected the state's argument that the plan paid for only a portion of the tuition at a sectarian school, saying "if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools." *Id.* at 787.

The cases of *Everson v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (1947), and *Board of Education v. Allen*, 392 U.S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968) were carefully distinguished by the Court. In *Everson*, the Court upheld tax deductions for parents who expended bus fare for children who attended religious schools, reasoning that the bus fare program was analogous to the provision of services such as police and fire protection, sewage disposal, highways and sidewalks for parochial schools. *See* 330 U.S. at 17-18. The Court found that these services, common to all citizens, are "so separate and so indisputably marked off from the religious function, that they may fairly be viewed as reflections of a neutral posture toward religious institutions." *Id.* at 18. In *Allen*, the Court upheld a statute which allowed secular textbooks to be provided to children attending religious

schools, finding that "the State claims no right to distribute religious literature," and noting that "we cannot assume that school authorities . . . are unable to distinguish between secular and religious books." 392 U.S. at 244-45. The *Nyquist* Court distinguished these two cases not only based on their neutral posture toward religion, but on the fact that in both of those cases, "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." 413 U.S. at 782 n. 38, (citing *Tilton v. Richardson*, 403 U.S. 672, 29 L. Ed. 2d 790, 91 S. Ct. 2091 (1970) (making federal aid available to all institutions of higher learning)).

The Court noted that unlike in *Everson* and *Allen*, the tuition grants in *Nyquist* were not a neutral attempt to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools, as the "grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools totally at state expense." 413 U.S. at 782 n. 38 (internal quotation marks omitted). The Court additionally determined that this argument of neutrality, if upheld, would be overly broad, providing "a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools – a result wholly at variance with the Establishment Clause." *Id.*

The Supreme Court has revisited many of the issues raised in *Nyquist*. In *Agostini v. Felton*, 521 U.S. 203, 237, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997), the Court stated that "we do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have,

by implication, overruled an earlier precedent." The Court continued to reaffirm "that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, *the Court of Appeals should follow the case which directly controls,* leaving to this Court the prerogative of overruling its own decisions." *Id.* (emphasis added). The Supreme Court has refrained from overruling *Nyquist,* and has instead distinguished various cases on the basis of their facts; this Court has accordingly followed that approach. "A single factual difference consequently can serve to entangle or free a particular governmental practice from the reach of the [Establishment] Clause's constitutional prohibition." *Coles,* 171 F.3d at 376. We therefore look to relevant case law to assist us by analogy in analyzing the factual discrepancies between this case and *Nyquist.*

In *Mueller v. Allen,* 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983), the Court found constitutional a Minnesota statute which allowed state taxpayers to deduct on their state income tax certain tuition, transportation and educational expenses of their children attending elementary or secondary schools. Following the *Lemon* test, the Court agreed that the statute had the secular purpose of defraying the cost of education for all parents, regardless of the type of school their children attend. *Id.* at 395. Analyzing the effect of the statute, the Court held that the program did not have a primary effect of advancing religion because the tax deduction was a traditional area for state legislatures to codify policies which "achieve an equitable distribution of the tax burden," and because the deduction was available for educational expenses incurred by all parents, whether their children attended

public schools, nonsectarian private schools, or church-affiliated schools. *Id.* at 396-98.

The Court found it compelling that the deduction was available for all parents with school age children, stating that this aspect was "vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Id.* at 398. The Court analogized the tax deduction scheme as similar to the G.I. Bill, or other forms of "public assistance made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." *Id.* The Court found it significant that under the Minnesota plan, governmental aid was only channeled through the parents, rather than directly paid to the parochial institutions, and noted that it would not base the constitutionality of a statute on the consideration of yearly statistical evidence concerning which nonsectarian schools – religious or otherwise – benefitted from the tax deduction. *Id.* at 401. The Court stated that the Establishment Clause is not a bar to "the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986), the Supreme Court found constitutional a Washington State program which provided vocational rehabilitation assistance grants to a blind individual who attended a Christian college in the hope of becoming a pastor. The

Court found the statute's purpose "unmistakably secular," *id.* at 486, and found that unlike *Nyquist*, "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488. The fact that the vocational assistance was paid directly to the student, who could expend the educational funds on "wholly secular education," persuaded the Court to find that the program did not create an incentive to apply the aid to religious education. *Id.* "Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. . . . Nothing in the record indicates that . . . any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." *Id.* The Court also found that "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion." *Id.* at 489.

In *Agostini v. Felton*, the Court held that the Establishment Clause did not bar a New York program which sent public school teachers into parochial schools to provide remedial education to disadvantaged children. Recognizing that there had been significant changes in Establishment Clause jurisprudence, the Court found that it could no longer presume "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." 521 U.S. at 223. The Court noted that those direct aid programs where grants are "made available

generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted [are valid departures from the general rule] that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225. Relying on an earlier case which had found it permissible to place a public school sign language interpreter into a private parochial school under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, the Court determined that these instances involve situations where money ultimately goes to religious schools "only as a result of the genuinely independent and private choices of individuals." *Id.* at 225-26 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 125 L. Ed. 2d 1, 113 S. Ct. 2462 (1993)). The Court noted as a central part of its analysis that the services provided by public school employees were remedial, stating that the "services do not, therefore, relieve sectarian schools of costs they otherwise would have borne in educating their students." 521 U.S. at 228. The Court concluded that the New York program services "are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school." *Id.* at 232.

The Supreme Court revisited this issue this past term. By a plurality, the Court upheld a program to loan educational materials and equipment to private religious schools which channeled federal funds through state agencies. *See Mitchell v. Helms*, 147 L. Ed. 2d 660, 120 S. Ct. 2530 (2000). Writing for four justices, Justice Thomas concluded that the critical question in cases of government aid to religious schools is whether the government

aid is neutral: whether it results from the genuinely independent and private choices of individual parents. *See* 120 S. Ct. at 2541-44. Justice Thomas noted that the nexus between neutrality and private choice was the prominent, even the chief factor, in upholding government aid in *Agostini, Zobrest, Witters,* and *Mueller,* and found that there is a close relationship between private choice and the question of whether a program creates a financial incentive to undertake religious schooling. *See id.* at 2543.

The opinion goes on to state that "if aid to schools, even direct aid, is neutrally available and, before reaching or benefitting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion." 120 S. Ct. at 2544 (internal citations omitted). The opinion recognizes that there exist "special Establishment Clause dangers when money is given to religious schools or entities directly rather than, as in *Witters* and *Mueller,* indirectly." *Id.* at 2546 (internal citations omitted). In a footnote, Justice Thomas hypothesized "that the principles of neutrality and private choice would be adequate to address those special risks." *Id.* at 2547 n. 8. He continued to find that at least in regards to *Nyquist,* the prohibition against direct payments was linked to "serious concerns about whether the payments were truly neutral." *Id.*

Although Justice O'Connor concurred in the judgment, she wrote separately in *Mitchell* based upon her belief that "the plurality announces a rule of unprecedented breadth for the evaluation of Establishment Clause challenges to government school-aid programs."

120 S. Ct. at 2556. Justice O'Connor's concurring opinion shows disagreement not only with the "expansive scope of the plurality's rule[,]" but with two specific aspects of its analysis. *Id.* First, she found the plurality's "treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs." *Id.* Second, she found "the plurality's approval of actual diversion of government aid to religious indoctrination is in tension with our precedents and . . . unnecessary to decide the instant case." *Id.*

While agreeing with Justice Thomas that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges," Justice O'Connor opined that "neutrality is not alone sufficient to qualify the aid as constitutional." 120 S.Ct at 2557-58. She criticized Justice Thomas's opinion for relying on logic which would support direct government aid to religious organizations based on the number of persons belonging to each organization. "The plurality opinion foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives." *Id.* at 2560. Justice O'Connor rejected an outright ban on any diversion of government funds to sectarian uses, but would enact a rule which requires plaintiffs to prove that the aid in question is, or has been, used for religious purposes, and found that "presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause." *Id.* at 2567.

Justice O'Connor concluded that because the school-aid program in *Agostini* was similar to that at issue in *Mitchell*, the *Agostini* criteria should control the outcome of the case; however, she noted that the "school-aid cases often pose difficult questions at the intersection of the neutrality and no-aid principles and therefore defy simple categorization under either rule." 120 S. Ct. at 2560.

In regard to *Mitchell* and its sharply divided plurality, we note that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976)). Accordingly, we find that the opinion of Justice O'Connor is the narrower of the plurality, as it utilizes the standard of *Agostini* based on a factual similarity rather than creating a new standard centered on neutrality, thereby making its mandates controlling.

III.

We now apply the framework established by precedent to the case before us, recognizing the predominating theme in this area of law to be the need for careful judicial attention to the factual detail in the challenged statutory scheme.

At the outset, we note that Defendants' argument concerning other options available to Cleveland parents such as the Community Schools is at best irrelevant.

Analyzing the scholarship program choices as compared to choices or schools outside the program is asking this Court to examine the entire context of Ohio education. Such a question is not before this Court. The Defendants' argument would rewrite the law to require that the courts look to all possible alternatives to a challenged program, thus visiting issues of legislative choice and educational policy which no plaintiff has raised.

At oral argument, Defendants asserted repeatedly that the Community Schools program should be considered coterminous with the voucher program, arguing that the programs are merely separate sections in the statute. However, the statutory record does not support this argument, except for perhaps the literal meaning that the two programs do indeed occupy separate sections in the Ohio Code. The school voucher program is enacted as a complete program in the Ohio Revised Code. *See* Ohio Rev.Code §§ 3313.974-3313.983. The program is enacted as a part of the chapter on Boards of Education. *See* Ohio Rev.Code § 3313.01 *et seq.* Furthermore, the school voucher program, and only the school voucher program, was challenged by Plaintiffs in this lawsuit. In contrast, the Community Schools program is codified in its own chapter. *See* Ohio Rev.Code §§ 3314.01 *et seq.* It is similarly a complete program within the Code: the statutory provisions govern all aspects of the program without reference to the voucher program. We may not view these two programs as inextricably interdependent when the plain language of the statutory scheme demonstrates the opposite. It is simply not the proper role of the courts to change statutory construction by judicial fiat. *See Brogan v. United States*, 522 U.S. 398, 408, 139 L. Ed. 2d 830, 118

S. Ct. 805 (1998); *Nat'l Life and Accident Ins. Co. v. United States*, 524 F.2d 559, 560 (6th Cir.1975) ("The Courts . . . do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather it is their function to give the natural and plain meaning effect to statutes. . . . "). Should we consider the Community Schools program in our analysis of the constitutionality of the school voucher program, we would open the door to a wide-reaching analysis which would permit us to consider any and all scholarship programs available to children who qualify for the school voucher program: we would be considering and comparing every available option for Cleveland children. Such an analysis would expand our jurisdiction far beyond the case at hand; we are presented only with the question of whether the school voucher program violates the Establishment Clause, and we must limit ourselves to that issue, regardless of the temptations Defendants' arguments present.

We find that *Nyquist* governs our result. Factually, the program at hand is a tuition grant program for low-income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*. Under both the New York statute in *Nyquist*, as well as the Ohio Statute at issue, parents receive government funds, either in direct payment for private school tuition or as a reimbursement for the same, and in both cases, the great majority of schools benefitted by these tuition dollars are sectarian. The *Nyquist* Court itself found there to be no distinction between "a reimbursement, a reward, or a subsidy, [as in all three,] the substantive impact is still the same." 413 U.S. at 786. As

in *Nyquist*, the Ohio program contains no "effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes." *Id.* at 780. Here, there is clearly "no endeavor to guarantee the separation between secular and religious functions and to ensure that State financial aid supports only the former." *Id.* at 783. In both *Nyquist* and this case, there are no restrictions on the religious schools as to their use of the tuition funds – the funds may be used for religious instruction or materials as easily as for erasers and playground equipment.

Despite the language of the statute, there is no evidence that the tuition vouchers serve as a neutral form of state assistance which would excuse the direct funding of religious institutions by the state, despite the statute's language. Admittedly, the voucher program does not restrict entry into the program to religious or sectarian schools, but facial neutrality alone does not bring state action into compliance with the First Amendment. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993). The school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions, and the Cleveland program limits the schools to which a parent can apply the voucher funds to those within the program. Practically speaking, the tuition restrictions mandated by the statute limit the ability of nonsectarian schools to participate in the program, as religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs. *See* Martha Minow, *Reforming School Reform*, 68 Fordham L. Rev. 257, 262

(1999) (finding that voucher funding levels typically "approximate[ ] the tuition level set by parochial schools [which] reflects subsidies from other sources"). In fact, Defendants admit that there is incentive for private non-sectarian schools to participate in the community schools program rather than in the school voucher program. *See* Brief of State at 10. The evidence illustrates this point in that 82% of participating schools are sectarian, just as in *Nyquist* where 85% of the participating schools were sectarian. Beyond that, we note that the number of available places for students in sectarian schools is higher than 82%, as many of the sectarian schools are larger and provide a greater number of places for children in the voucher program. Moreover, close to 96% of the students enrolled in the program for the 1999-2000 school year attended sectarian institutions.

The alleged choice afforded both public and private school participants in this program is illusory in that the program's design does not result in the participation of the adjacent public schools from outside the Cleveland school district. Per pupil expenditures in the public schools are backed by $7,097 in public funding. *See* Brief of Senel Taylor Intervenors at 17. At a maximum of $2,250, there is a financial disincentive for public schools outside the district to take on students via the school voucher program. Since its inception, no public schools from outside Cleveland have registered in the school voucher program, and there are no spaces available for children who wish to attend a suburban public school in place of a private school under the program. Therefore, the program clearly has the impermissible effect of promoting sectarian schools.

This is not the type of case which would fall into the exception to the *Nyquist* rules. Here, state assistance is only available to those students who attend private schools – the aid is clearly dependent on whether parents choose public or private schools. That the majority of places available in the program are for students attending sectarian schools is not unpersuasive. This program provides incentives for parents to choose schools other than mainstream public ones, but that choice does not extend to schools outside of the program. Students may not choose to attend community or magnet schools using a voucher, they may not apply a voucher to tuition at a private school outside the Cleveland School District, and they may not receive a voucher for a private school within the Cleveland School District which has not registered as part of the program. Rather, the program provides financial assistance for those parents who wish to place their children in the particular private schools, mostly religious, which take part in the program. We find such a scheme directly akin to *Nyquist's* offensive aid to only private school students, and not an instance where "the class of beneficiaries included all schoolchildren, those in public as well as those in private schools." 413 U.S. at 782 n.38. The effect of this program, like *Nyquist* and unlike *Mueller* and subsequent cases, is one where "public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Mueller*, 463 U.S. at 398.

Contrary to the tax deduction generally available in *Mueller*, the Ohio voucher program is available to curtail only those expenses which students attending certain private schools accrue. *See* 463 U.S. at 398 (distinguishing

the *Mueller* program from that in *Nyquist* because in *Nyquist*, "tuition grants [were] provided only to parents of children in nonpublic schools"). The idea of parental choice as a determining factor which breaks a government-church nexus is inappropriate in the context of government limitation of the available choices to overwhelmingly sectarian private schools which can afford the tuition restrictions placed upon them and which have registered with the program. The absence of any meaningful public school choice from the decision matrix yields a limited and restricted palette for parents which is solely caused by state legislative structuring.

In contradistinction to *Witters*, a student under the Ohio statute cannot apply state aid to any school he or she chooses, including public schools, since under the Ohio program, no public schools have enrolled, nor are likely to enroll. Similarly, *Agostini* is inapposite because the services made available to students at parochial schools through the placement of public school teachers to teach secular subjects were available to all qualifying students without regard to the nature of the institution they attended. 521 U.S. at 232 (finding that under the New York program at issue in *Agostini*, and unlike the *Nyquist* program, services "are available to all children who meet the Act's eligibility requirements no matter . . . where they go to school). While the program upheld in *Mitchell* provided for the loan of instructional equipment by state agencies to both public and private schools, in this case aid predominantly flows directly to the coffers of religious institutions. Unlike *Mitchell*, under the Ohio statute, there are not "numerous private citizens who are free to direct the aid elsewhere" as the majority

of the choices available to parents and students are religious institutions. 120 S. Ct. at 2533 (Thomas, J. plurality). The voucher program at issue constitutes the type of "direct monetary subsidies to religious institutions," that Justice O'Connor found impermissible in *Mitchell*. *Id.* at 2559-60 (O'Connor, J. concurring). This program is dissimilar to that upheld in both *Agostini* and *Mitchell*, as here aid goes only to students enrolled in private schools, thereby fostering the type of government entanglement prohibited under the Establishment Clause.

To approve this program would approve the actual diversion of government aid to religious institutions in endorsement of religious education, something "in tension" with the precedents of the Supreme Court. *Mitchell*, 120 S. Ct. at 2556. We find that when, as here, the government has established a program which does not permit private citizens to direct government aid freely as is their private choice, but which restricts their choice to a panoply of religious institutions and spaces with only a few alternative possibilities, then the Establishment Clause is violated. This scheme involves the grant of state aid directly and predominantly to the coffers of the private, religious schools, and it is unquestioned that these institutions incorporate religious concepts, motives, and themes into all facets of their educational planning. There is no neutral aid when that aid principally flows to religious institutions; nor is there truly "private choice" when the available choices resulting from the program design are predominantly religious.

We conclude that unlike *Mitchell*, *Agostini*, *Witters* and *Mueller*, the Ohio scholarship program is designed in a manner calculated to attract religious institutions and

chooses the beneficiaries of aid by non-neutral criteria. The effect of the voucher program is in direct contravention to these Supreme Court cases which mandate that the state aid be neutrally available to all students who qualify, that the parents receiving the state aid have the option of applying the funds to secular organizations or causes as well as to religious institutions, and that the state aid does not provide an incentive to choose a religious institution over a secular institution. Accordingly, we hold that no genuine issue of material fact remains for trial that the voucher program has the primary effect of advancing religion, and that it constitutes an endorsement of religion and sectarian education in violation of the Establishment Clause. We therefore affirm the district court's order granting summary judgment to Plaintiffs.

IV.

Intervenor Taylor asserts that the district court erred by holding that the Ohio Supreme Court's opinion in *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999), did not estop Plaintiffs' claim, and by refusing to certify the question of estoppel to the Ohio Supreme Court. This Court reviews the issue of collateral estoppel as part of the summary judgment determination *de novo*. This Court reviews the district court's denial of certification for an abuse of discretion. *See Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995).

Under both federal and state law, an "issue must have been necessary to support the judgment . . . in the prior proceeding" in order to find collateral estoppel. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158

F.3d 361, 376-77 (6th Cir. 1998); *accord MetroHealth Med. Ctr. v. Hoffmann-LaRoche, Inc.*, 80 Ohio St. 3d 212, 685 N.E.2d 529, 533 (Ohio1997) ("Issue preclusion precludes the relitigation of an issue that has been actually and necessarily litigated and determined in a prior action."); *cf. Ameigh v. Baycliffs Corp.*, 81 Ohio St. 3d 247, 690 N.E.2d 872, 875 (Ohio 1998) ("Where the judgment of a court is not dispositive on issues which a party later seeks to litigate, *res judicata* is not applicable . . . even if the prior court decision has discussed the issues that are the subject of the current litigation."). A determination is not essential to the judgment if the judgment could be supported by an adequate and independent state ground. *See Lambrix v. Singletary*, 520 U.S. 518 522-24, 137 L. Ed. 2d 771, 117 S. Ct. 1517 (1997). In *Goff*, the Ohio Supreme Court held that the 1995 school voucher program was enacted in violation of the one-subject rule of the Ohio Constitution, and on that basis, ordered the program in its entirety "stricken" from the Ohio statute books. 711 N.E.2d at 203. That ruling entitled the plaintiffs to the relief they requested, and therefore, any discussion of other grounds for striking or upholding the statute could be neither necessary nor essential to the holding. The Ohio Court determined that the entire program could not stand; therefore, any analysis as to the constitutionality of particular portions of the program was by definition advisory or dicta, and cannot be relied upon to bar further litigation. Because Plaintiffs would not be able to obtain Supreme Court review of the Ohio Supreme Court's determination as to the Establishment Clause, such determinations cannot constitute collateral estoppel. *See Cal. v. Rooney*, 483 U.S. 307, 311, 97 L. Ed. 2d 258, 107

S. Ct. 2852 (1987) (declining to review a Fourth Amendment ruling adverse to the state of California where that ruling was unnecessary to a judgment in favor of the state).

Similarly, the district court did not err in refusing to certify the question to the Ohio Supreme Court. The governing law as to whether a party is estopped from relitigating an issue not essential to the court's determination is clear and uncontroverted; we therefore find no abuse of discretion in the district court's determination.

V.

Before concluding, we must pause to briefly address the dissent, not for the purpose of dignifying its hyperbole, but to quash any putatively substantive argument which may have found its way through the gratuitous insults. The dissent first makes the bald-faced assertion that the majority has struck down the voucher program as unconstitutional without any "meaningful" independent analysis, and that the majority simply concludes that the program is "foreordained" to be found unconstitutional under *Nyquist*. According to the dissent, the New York statute in *Nyquist* is "totally different" from the Ohio statute before us today, thus making it impossible to "take seriously" the majority's conclusion that *Nyquist* is controlling. However, even a cursory reading of the majority opinion clearly indicates that it is the dissent and its rhetoric which should not be taken seriously. As carefully set forth in Part III of this opinion, the Ohio statute at issue has the same effect as that of the New

York statute held unconstitutional under the Establishment Clause in *Nyquist*. Both statutes have the impermissible effect of benefitting only students in particular private, and mostly religious, schools, irrespective of the illusory choice provided on the face of the Ohio statute. The fact that the dissent may not agree with the analysis set forth in the opinion to illustrate this point does not *ipso facto* render the analysis "meaningless."

Second, in a similar vein, the dissent claims that the majority reaches its conclusion that the voucher program is unconstitutional under the Establishment Clause without conducting any "meaningful" analysis into the Supreme Court's several cases on this issue since *Nyquist* was handed down. However, in Part II of this opinion, the majority painstakingly sets forth First Amendment Establishment Clause jurisprudence and its evolution since *Nyquist*, while carefully applying that law to the statute at hand in the following section. Again, it is obvious that the dissent's bald-faced assertion that this analysis is not "meaningful" is apparently born out of nothing more than its disagreement with the outcome of this case, rather than with an objective observation. It is the majority which employs the evolving jurisprudential standards in reaching its outcome, while the dissent employs a rigid antiquated standard to reach its result driven outcome in contravention of the Supreme Court's latest pronouncements.[1] *See, e.g., Agostini*, 521 U.S. at 222-26.

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[1] Judge Ryan inappropriately calls for an *en banc* review of the matter in his dissent. There are rules and procedures governing a call for *en banc* review once a case has been decided, whether the call is made by a party or *sua sponte* by an active

VI.

We recognize the importance of this case and the precedential value it espouses. Equally as important, we are aware of the critical nature of questions of educational policy, and the need to establish successful schools and academic programs for children. We find, however, that even more important is the need to uphold the Constitution of the United States and, in this case, to override the State of Ohio's statutory scheme where it constitutes an impermissible infringement under the Establishment Clause of the First Amendment. We therefore **AFFIRM** the district court's order finding the school voucher program unconstitutional, as well as the court's determination that Plaintiffs are not collaterally estopped.

CONCUR BY:
RYAN (In Part)

DISSENT BY:
RYAN (In Part)

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judge of this Court or member of the original panel, and it is the process contemplated by these rules and procedures which should be used to invoke *en banc* review after the Court's opinion has been issued. *See Craft v. CIR*, 2000 U.S. App. LEXIS 29586, Nos. 99-1734, 99-1737, 200 WL 1726906, at n.18 (6th Cir. Nov. 22, 2000) (criticizing the concurring opinion's exhortation for *en banc* review of the matter, while noting that Fed. R. App. P. 35(b) and 6 Cir. I.O.P. 35(c) set forth the appropriate procedures to follow when calling for such review). The unfortunate practice of arguing for *en banc* review of a case in a panel member's separate opinion – instead of simply permitting the Court's regular operating procedures for seeking such review to be followed subsequent to the issuance of the majority opinion – is one which should not be perpetuated.

DISSENT:

CONCURRING IN PART, DISSENTING IN PART

RYAN, Circuit Judge, concurring in part and dissenting in part. My colleagues' resolution of the question presented by the plaintiffs' collateral estoppel claim is eminently correct and so I join part IV of the court's opinion. However, because I believe Ohio's voucher program to be constitutional under the First Amendment and the Supreme Court's Establishment Clause cases interpreting the amendment, I must respectfully dissent from the majority's treatment of the voucher program's constitutionality.

My brothers have struck down as unconstitutional Ohio's effort to establish a school-choice voucher program whose primary purpose is to enable mostly minority poverty-level school children, in Cleveland, Ohio, to escape the devastating consequences of attending Cleveland's demonstrably failed public schools. My colleagues have done so not on the basis of any independent constitutional analysis of the Ohio Pilot Project Scholarship Program, as the voucher program is formally known, but because they claim the invalidity of the statute is a conclusion foreordained by the United States Supreme Court's decision in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973). I disagree. The New York statute interpreted in *Nyquist* and the Ohio statute before us are totally different in all of their essential respects, both in their purposes and their provisions for carrying out their respective purposes. It is impossible to take seriously the majority's claim that *Nyquist* governs our result and, *for*

that reason, requires that the Ohio voucher program must be struck down.

Moreover, the majority's refusal to conduct any meaningful analysis of the Supreme Court's several Establishment Clause decisions handed down in the 27 years since *Nyquist* was decided, its insistence that the plainly distinguishable *Nyquist* case is directly on point, and the factually unsupported antireligious-schools arguments in the opinion strongly suggest that the majority has simply signed onto the familiar anti-voucher mantra that voucher programs are no more than a scheme to funnel public funds into religious schools.

I.

It is implicit in the majority's reasoning that there is no need for any independent analysis whether Ohio's voucher program violates the Establishment Clause because *Nyquist* is "on point with the matter at hand." Slip op. at 13. In my judgment, the majority is mistaken as a matter of *fact* (the two statutes are totally different) and as a matter of *law* (the relevant Establishment Clause jurisprudence has changed since *Nyquist*). As to the latter, a reading of the Supreme Court's Establishment Clause cases decided since 1973 makes it unmistakably clear that the voucher program passes constitutional muster. I do not claim that the *Nyquist* decision has been overruled, although some of the reasoning in the *Nyquist* opinion has been "undermined," as the Ohio Supreme Court put it in *Simmons-Harris v. Goff,* 86 Ohio St. 3d 1, 711 N.E.2d 203, 208 (Ohio 1999); *Nyquist* is simply inapposite to the appeal before us.

The New York statutory provisions struck down in *Nyquist* and the Ohio voucher program are essentially different laws; they are plainly distinguishable both in their declared purposes and in the manner of their application. For that reason alone, the reasoning and the holding of the *Nyquist* decision cannot govern our result.

A.

I begin with a comparison of the New York statutory provisions construed in *Nyquist* and the Ohio statute before us; a comparison that shows very clearly that the two laws are essentially different. I then examine the Supreme Court Establishment Clause cases decided since *Nyquist*, which clearly indicate that the Ohio voucher program is not unconstitutional.

1.

In *Nyquist*, the Supreme Court was required to decide whether a New York statute containing provisions for both direct and indirect financial assistance to New York's private schools violated the Establishment Clause. The statute provided for three forms of assistance: (1) direct grants for building maintenance and repairs for private school buildings; (2) tuition reimbursement grants for some low-income parents of children already attending the private schools; and (3) a form of tax relief for parents who failed to qualify for tuition reimbursement under the statute. *See Nyquist*, 413 U.S. at 762-65.

The New York legislature enacted the statute for the *sole* purpose of directly benefitting New York state's 2,038

financially pressed *private* schools, wherein some 700,000-800,000 students – almost 20% of the state's entire elementary and secondary school population – were being educated. *See id.* at 768. The legislative "findings" in the New York statute declared: (1) it was in the state's interest to provide funding for "maintenance and repair" of the state's private schools in order to protect the health and safety of those attending the schools; (2) the state had an interest in promoting "alternative educational systems"; and (3) a "precipitous decline" in the number of children attending private schools would perpetuate an already existing fiscal crisis in public schools. *Id.* at 763-65.

The *Nyquist* Court held that the New York law offended the Establishment Clause because "the effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783. Furthermore, the *Nyquist* Court concluded that "in the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.* at 780.

The Ohio voucher program, which is adequately described in the majority opinion, could not be more unlike the New York statute both in its purpose and in the manner of its application. The essential differences between the New York and Ohio statutes may be summarized as follows:

First, the purpose of the New York statute was to provide financial help to New York's financially troubled

private schools because their closing would force New York's public schools to absorb the private school students, resulting in massive increased costs and the related burdens of absorbing as many as three quarters of a million new students.

The purpose of the Ohio statute, on the other hand, is to provide financial help to poverty-level students attending the *public schools* in Cleveland in order to enable them, if they wish, to attend nonreligious private schools, religious private schools, public schools in neighboring districts that wish to participate in the voucher program, or to obtain special tutoring while remaining in the Cleveland public schools.

Second, the New York program involved *direct* financial grants to New York's *private* schools, religious and nonreligious, primarily for maintenance and repair. Although the tuition reimbursement and tax relief sections of the statute appeared to benefit the parents of private school children, the *Nyquist* Court stated that the "tuition reimbursement program also fails the 'effect' test, for much the same reasons that govern its maintenance and repair grants." *Id.*

Under the Ohio voucher program, on the other hand, there is no provision for any financial grants in any form to any private schools. A voucher recipient receives a scholarship check, and the funds therefrom reach a private religious school only after a child's parents have considered a variety of options available to them and have chosen the religious private school as the best option for their child.

Third, the New York statute permitted government aid to schools that discriminated against children on the basis of religion and, in fact, several qualifying schools imposed religious restrictions on admissions. *See id.* at 767-68.

The Ohio voucher program, on the other hand, contains a provision explicitly forbidding participating schools from discriminating against prospective students on the basis of religion. *See* Ohio Rev. Code § 3313.976(A)(4).

It is clear that the New York statute struck down in *Nyquist* and the Ohio statute before us are dissimilar laws both in their purposes and the methodologies for carrying out their purposes. As the majority acknowledges, "[a] single factual difference consequently can serve to entangle or free a particular governmental practice from the reach of the [Establishment] Clause's constitutional prohibition." Slip op. at ___ (internal quotation marks and citation omitted). A case construing a statute so manifestly different than the one before us could hardly, as a *factual* matter, be a binding precedent on this court.

2.

The substantial differences in the purpose and application of the two statutes is not the only reason *Nyquist* does not govern our result. The additional reason is that the rule of law upon which *Nyquist* was decided has changed. First, the *Nyquist* era categorical prohibition against direct grants to aid religious schools is no longer the law; and second, the criteria for determining when a

statute has the forbidden "primary effect" of advancing religion have been modified.

In *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), the Supreme Court fashioned the following test for assessing whether a statute violates the Establishment Clause:

> First, the statute must have a secular legislative purpose; second, its principal or *primary effect* must be one that neither *advances* nor inhibits *religion* . . . ; finally, the statute must not foster an excessive government entanglement with religion.

Id. at 612-13 (emphasis added) (internal quotation marks and citation omitted).

The *Nyquist* Court ruled that the New York statute violated the *Lemon* test because it had the "impermissible effect of advancing religion." *Nyquist*, 413 U.S. at 794. It did so, the Court said, by providing direct financial assistance to religious schools without any restrictions as to the schools' use of the funds, therefore "advancing the religious mission of sectarian schools." *Id.* at 779-80. But three years ago in *Agostini v. Felton*, 521 U.S. 203, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997), the Supreme Court declared unmistakably that "we have departed from the rule . . . that all government aid that directly assists the educational function of religious schools is invalid." *Id.* at 225. The *Agostini* Court then proceeded to redefine and narrow the criteria for determining when government aid that finds its way to a religious school has the primary effect of advancing religion.

Again, I do not question for a moment the correctness of the Supreme Court's decision in *Nyquist*. I accept it both analytically and precedentially as a faithful 1973 application of the "primary effect" test of *Lemon*. However, *Nyquist* was not analyzed and decided under what the *Agostini* Court called its "changed . . . understanding of the criteria used to assess whether aid to religion has an impermissible effect." *Id.* at 223. Since this appeal is also an "impermissible effect" case, our decision cannot be controlled by *Nyquist*.

B.

What then is the Supreme Court's "changed . . . understanding" of the proper test for determining whether a law has the primary effect of advancing religion?

In *Mueller v. Allen*, 463 U.S. 388, 77 L. Ed. 2d 721, 103 S. Ct. 3062 (1983), the Court held that a Minnesota statute authorizing a tax deduction for certain educational expenses for parents of students attending either public or private schools, religious or nonreligious, did not violate the "impermissible effect" prong of the *Lemon* test. The Court focused on the fact that the deduction was given directly to the parents, without regard to the type of school, religious or nonreligious, to which the parents might choose to send their children, as a strong indicator of the statute's "neutrality." *See id.* at 397-400. Any money received at a religious school, the Court said, was "ultimately controlled by the private choices of individual parents." *Id.* at 400.

This principle – that whether public funds find their way to a religious school is of no constitutional consequence if they get there as a result of genuinely private choice – was reasserted in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 88 L. Ed. 2d 846, 106 S. Ct. 748 (1986). There, a Washington state program survived an Establishment Clause challenge even though it provided vocational rehabilitation assistance for a blind individual to attend a Christian college in order to study to be a Christian pastor. Funds under the program were dispersed directly to the eligible applicants who made the choice of where to expend the educational funds; therefore, "any aid . . . that ultimately flowed to religious institutions [did] so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488.

In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 125 L. Ed. 2d 1, 113 S. Ct. 2462 (1993), the Court upheld the constitutionality of a program providing a sign-language interpreter for a deaf student in a Catholic high school. Relying upon *Witters* and *Mueller*, the *Zobrest* Court concluded that the statute gave parents the choice of where to send their eligible children to school and "distributes benefits neutrally . . . without regard to the 'sectarian-nonsectarian, or public-nonpubiic nature' of the school." *Id.* at 10 (quoting *Witters*, 474 U.S. at 487).

This line of cases culminated in the *Agostini* decision in 1997, in which the Supreme Court declared that its understanding of the criteria for determining whether, in any specific program, government aid has the primary effect of advancing religion had "changed." Indeed, in *Agostini* the Supreme Court went so far as to modify the

Lemon test it had relied upon in *Nyquist*. The *Agostini* Court began by recasting *Lemon*'s "entanglement" inquiry as a factor under the "impermissible effect" prong rather than as a separate and independent c iterion. *See Agostini*, 521 U.S. at 232-34. It then identified three new subcriteria to consider when evaluating whether a government-aid program violates *Lemon*'s "impermissible effect" prong. These are:

> (1) whether the aid results in governmental indoctrination;
>
> (2) whether the aid program defines its recipients by reference to religion; and
>
> (3) whether the aid creates an excessive entanglement between government and religion.

See id. at 234.

Using this modified *Lemon* test, the *Agostini* Court found constitutional a federally mandated New York program that sent public school teachers into private parochial schools to provide remedial education to eligible children. Under the program, children meeting the eligibility requirements received the services, whether they attended a private or public school. *See id.* at 232. The *Agostini* Court concluded that programs in which money ultimately flows to a private, religious school based on the " 'genuinely independent and private choices of' individuals" do not violate the Establishment Clause. *Id.* at 226 (quoting *Witters*, 474 U.S. at 488).

Finally, in *Mitchell v. Helms*, 147 L. Ed. 2d 660, 120 S. Ct. 2530 (2000), a plurality opinion written by Justice Thomas, the Court upheld the constitutionality of a federally mandated Louisiana program where educational

materials were loaned to public and private schools, both religious and nonreligious. Justice Thomas emphasized that the statute did not have an "impermissible effect" because the "principles of neutrality and private choice, and their relationship to each other [that] were [also] prominent" in the Court's decisions in *Agostini*, *Zobrest*, *Witters*, and *Mueller* were present. 120 S. Ct. at 2542.

II.

It is against this background of changed Supreme Court Establishment Clause jurisprudence that we must test the constitutionality of the Ohio voucher program.

The Ohio statute is the product of a 1994 order issued by the United States District Court in Cleveland, directing the Ohio Superintendent of Education to address the educational crisis in Cleveland's public schools. *See Reed v. Rhodes*, 869 F. Supp. 1274 (N.D. Ohio 1994). The Ohio legislature and the state's governor responded with the voucher program that is before us today. *See* Ohio Rev. Code §§ 3313.974-3313.979. We may safely assume that in fashioning the new law, the Ohio legislators and the governor knew that the challenge they faced was to design a law that would survive a federal constitutional challenge on Establishment Clause grounds. That is not to say that the statute the legislators wrote and the governor signed into law is insulated from federal judicial constitutional scrutiny. Rather, it is to say what the majority does not even acknowledge: this statute is *presumed* to be constitutional. *See McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969); *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger,*

Bower & Clancy, 740 F.2d 1362, 1366 (6th Cir. 1984). This presumption is not a mere literary figure for rote recitation in all appellate opinions addressing the constitutionality of legislative enactments; it is a bedrock rule of statutory construction, one we are bound assiduously to honor as we begin our assessment of the validity of the Ohio statute.

The first of the *Lemon* criteria that must be met if a statute is to survive an Establishment Clause challenge is that it have a "secular purpose." The Ohio voucher program meets this criterion and the plaintiffs agree that it does. The *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority, public school children from the devastating consequences of requiring them to remain in the failed Cleveland schools, if they wish to escape. There is also no serious claim that the statute is constitutionally invalid solely because it fosters an "excessive entanglement" between government and religion. Rather, the only issue in the case is whether the voucher program has the forbidden "primary effect" of advancing religion. This court's first duty, therefore, after recognizing that *Nyquist*'s factually and legally outdated decision is of no help, is to proceed to examine the first two criteria from *Agostini*'s "impermissible effect" test to determine whether the effect of Ohio's voucher program is to advance religion, either because (1) the aid it provides results in governmental indoctrination, or (2) the program defines its recipients by reference to religion. *See Agostini*, 521 U.S. at 234. These are the *only* two issues properly before us.

A.

In addressing *Agostini*'s first criterion for testing a statute's claimed impermissible effect, we must ask whether the government aid in the form of the tuition voucher results in "governmental indoctrination." It is obvious that the Ohio statute does not have the remotest effect of providing governmental indoctrination in any religion, to say nothing of having such a primary effect.

The Supreme Court decisions since *Lemon* and *Nyquist* have emphasized that the critical question in determining whether government aid ultimately flowing to religious schools results in governmental indoctrination is if the recipient beneficiaries make a "genuinely independent and private choice[ ]" to "spend" the funds in a religious school. *Id.* at 226 (internal quotation marks and citation omitted). If the recipients have such an independent and private choice, then the government's decision to provide the money to fund that choice does not have the effect of advancing religion. The government is, of necessity, neutral in the matter. Implicit in that constitutional rule of law, as it applies in this case, is that there must be a *genuine* choice from among a range of alternatives that indicate complete neutrality on the part of the government as to where the recipient parents may choose to spend the government-aid funds. The voucher program does not offend the Establishment Clause because the statute allows parents to make a *genuine* choice for their children who are currently in Cleveland public schools.

What are the choices Ohio has given these Cleveland parents?

(1) To permit their children to remain in the Cleveland public schools as before;

(2) To accept a tuition voucher for them to attend a Cleveland area nonreligious private school;

(3) To accept a tuition voucher for them to attend a Cleveland area religious private school;

(4) To accept a voucher for them to obtain special tutorial help in the Cleveland schools; or

(5) To accept a voucher for them to attend a public school in a district adjacent to Cleveland, although for the present these districts have declined to participate in the program.

See Ohio Rev. Code §§ 3313.976-3313.978.

It is difficult to imagine a statute that could afford its voucher recipients a broader spectrum of educational choice. It is true, of course, that the public school districts adjacent to Cleveland have declined to participate in the voucher program, but there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate. What we measure today is not whether the children in Cleveland have the fullest conceivable range of options available to them that a panel of federal judges might think to be ideal, but rather, whether the statute, as enacted, has the primary effect of advancing religion by involving the state in governmental indoctrination under *Agostini*'s first criterion. *See Mitchell*, 120 S. Ct. at 2541-44. To my knowledge, no federal court has *ever* held that a school-choice voucher program is unconstitutional because the range of choices does not include a public

school option; certainly the majority does not cite such a case.

B.

Neither does the Ohio program "define its recipients by reference to religion," the second *Agostini* factor for testing for "impermissible effect." *Agostini*, 521 U.S. at 234. The program defines the first-priority voucher recipients by reference to (1) their attendance in one of Cleveland's public schools; and (2) a family income that is not more than 200 percent of the federally established poverty level. *See* Ohio Rev. Code § 3313.978(A). And the statute explicitly forbids a religious test for admission to a participating school, including religious schools. *See id.* at § 3313.976(A)(4). A parent has the choice of using the voucher in a private religious school, a private nonreligious school, for tutoring in the public school, or in a public school in a neighboring district if any wish to participate. The statute expresses no preference, explicitly or implicitly, either as to the religion of the voucher recipients, or if the recipient chooses a private school, whether the voucher is applied to a religious or nonreligious school.

The *Agostini* Court recognized, of course, that the eligibility requirements of a government-aid program could "have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231. The Court noted that a financial incentive to choose a religious school over a nonreligious school is not present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor

disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.*

Despite the plain evidence that the aid to the parents of the Cleveland school children is indeed "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," *id.*, the majority continues to insist that the voucher program is not neutral because it creates a forbidden "incentive" for parents in Cleveland to choose a religious school. As best I can understand it, they rest this conclusion – unsupported though it is by any evidence in the record – on two further conclusions. The first is that because the vast majority – 82 percent – of the private schools participating in the Ohio program are religious, the people of Cleveland are denied a "genuine" choice. This argument is made despite the indisputable fact that of *all* the private nonreligious private schools participating in the program, not one has ever turned away a voucher applicant for any reason. This not very thinly veiled antipathy the majority has shown toward religious schools – its argument that there are too many religious schools in the program – is meritless for another reason: the Supreme Court has flatly rejected the argument that a high percentage of religious schools participating in a government-aid program is an indicator that the government is engaging in governmental indoctrination of religion. *See Mitchell*, 120 S. Ct. at 2542; *id.* at 2562 (O'Connor, J., concurring); *Agostini*, 521 U.S. at 229; *Mueller*, 463 U.S. at 401.

The majority then attempts to support its view that the Ohio statute creates a forbidden incentive for parents to choose a religious school by utilizing the transparent argument that this statute should be struck down because the religious schools in the program are too religious. In support of this proposition, the majority devotes considerable attention to the mission statements of several religious schools, which indicate the pervasively religious character of their programs. My brothers conclude therefrom that these schools "believe in interweaving religious beliefs with secular subjects" and "incorporate [in their curriculum] religious concepts, motives, and themes." Slip op. at 5, 27. Imagine, religious schools that are truly religious!

This plainly hostile attack on the religious schools in the Ohio voucher program is one I would of thought unworthy of mention in an opinion from this great court. Is the point being made here that religious schools may participate in a voucher program providing they are not too religious? Or, is it that these poverty-level parents in Cleveland cannot be trusted to understand what they will be exposing their children to if they choose one of these religious schools? One would have thought that the nail was long ago driven into the coffin bearing the discredited arguments that if a voucher program involved too many religious schools, or if those involved are honestly, genuinely, and essentially religious, the statute is therefore invalid as "advancing religion." This most unattractive argument was utterly rejected in *Witters*, 474 U.S. at 486-88, and *Mueller*, 463 U.S. at 397-400, and also was rejected in Justice Powell's concurring opinion in *Witters*.

See Witters, 474 U.S. at 492 (Powell, J., concurring). Moreover, Justice Thomas, writing for a clear majority *on this point* in *Mitchell*, stated:

> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now.

Mitchell, 120 S. Ct. at 2552.

The majority, in this case, straining mightily to strike down this law, then conjures still another anti-voucher argument (the reader will recall that the majority's decisional premise is that this case is controlled by *Nyquist* and, implicitly, that all else is irrelevant).

My colleagues' next non-*Nyquist* argument is that the "school voucher program is not neutral in that it discourages the participation by schools not funded by religious institutions." Slip op. at 23. This statement in the majority opinion, which, like so many others in the opinion, is totally without any basis in the evidence, is then fortified by my brothers' *ipse dixit* that "religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." *Id.* at 24. The only authority my colleagues offer for this speculation is a Fordham University Law Review article. I can only surmise that the point my colleagues wish to make here is that nonreligious schools will not participate in Ohio's voucher program because the voucher will not cover the cost of educating a student in a nonreligious school. This, my brothers reason, creates an "incentive" for the parents to send their children to the

religious schools where they can be educated more efficiently and for fewer dollars.

There is absolutely no evidence in the record to support the majority's argument that the Ohio statute creates a financial "disincentive" for Cleveland's neighboring, suburban public school districts to participate in the program. There is no evidence to support what the majority seems to imply – that some parents wishing to use a voucher choose not to do so because other Cleveland area public schools are not participating. And there is no evidence that if a public school chooses to participate in the voucher program, it will lose its state funding.

These arguments are built on a "factual" predicate that has absolutely no basis in the record. There is not a scintilla of evidence in this case that any school, public or private, has been discouraged from participating in the school voucher program because it cannot "afford" to do so. The import of this argument, as best I can understand it, is that the parents of the Cleveland school children have an "incentive" to choose Cleveland's religious schools because there are not enough nonreligious schools participating in the program. Of course, there is no evidence of that either. And there is no evidence that any of the several nonreligious, private schools participating in the program have *ever* rejected a single voucher applicant for any reason, including a supposed inability to afford the differential between the value of a $2,500 voucher and the actual cost of a nonreligious, private school education.

While I hesitate to dignify the majority's speculation with speculation of my own, what is at stake in this case

is too important to let any of my colleagues' meritless arguments go unanswered.

It is indisputable that no nonreligious, private school, or any other school for that matter, has ever been discouraged from participating in the Cleveland voucher program and there is no evidence that any private school, religious or nonreligious, has ever turned away a voucher applicant for any reason. Therefore, what my colleagues must be getting at is even more insidious and offensive. The point apparently is that Cleveland parents would never choose to send their children to a religious school in Cleveland if they could afford to send them to a nonreligious, private school, or another public school, but that they cannot do so because the cost differential between the value of a $2,500 voucher and the actual tuition of Cleveland's nonreligious, private schools is prohibitive. Again, it is of no small importance that there is absolutely no evidence in the record that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive. It is probably true that no private school, religious or nonreligious, can educate a child for the voucher value of $2,500. But, in all probability, the participating private schools are willing to accept the voucher as meeting a portion of the actual educational costs for these children and are willing to absorb the differential cost as part of their *pro bono* service in Cleveland to help save as many of these children as possible from the disastrous consequences of continuing in the city's failed public schools.

But more important than all of this speculation is the reality that the majority's "neutral only if affordable to

all" test is utterly meritless *as a matter of law* because the now settled Establishment Clause jurisprudence is that whether aid is allocated on the basis of neutral, secular criteria is the key determinant of whether, having made the aid available, the state has engaged in governmental indoctrination in religion. *See Agostini*, 521 U.S. at 231.

If the simplicity and clarity of the Supreme Court's language in *Agostini* is not sufficient to demonstrate that the Ohio statute does not in any respect operate to advance religion, confirmatory language of crystal clarity appears in the Supreme Court's recent decision in *Mitchell*. In a passage in his opinion which enjoys the support of a majority of the Justices, and arguably even the support of the dissenters, Justice Thomas states:

> The question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in these schools could reasonably be attributed to governmental action.

Mitchell, 120 S. Ct. at 2541.

The line of cases decided in the Supreme Court beginning with *Mueller* in 1983 and ending with *Mitchell* in 2000 make it unmistakably clear that the majority's "impermissible incentive" argument has no basis in our Establishment Clause jurisprudence. The rule is now settled that a government program that permits financial aid ultimately to reach religious schools does not offend the Establishment Clause if the government's role in the program is neutral. Neutrality exists if the "governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices

of individuals.' " *Id.* (quoting *Agostini*, 521 U.S. at 226). Justice Thomas wrote that "simply because an aid program offers private schools, and thus religious schools, a benefit that they did not previously receive does not mean that the program, by reducing the cost of securing a religious education, creates . . . an 'incentive' for parents to choose such an education for their children." 120 S. Ct. at 2543-44. Finally, Justice Thomas concluded that the possibility that government aid might be diverted by a sectarian school towards some religious end is irrelevant, for Establishment Clause purposes, if the government aid program provides the aid in a neutral manner. *See id.* at 2547.

In her concurring opinion in *Mitchell*, Justice O'Connor, joined by Justice Breyer, agreed that "neutrality is an important reason for upholding government-aid programs" against Establishment Clause challenges, but she reiterated that it was just one factor to consider in challenges to government school-aid programs and not a "factor [of] singular importance." *Id.* at 2556-57 (O'Connor, J., concurring). Even Justice Souter's dissenting opinion, which Justices Stevens and Ginsburg joined, conceded that the Establishment Clause presents no obstacle to government aid if it reaches sectarian schools as a result of the private choices of aid recipients. *See id.* at 2584 (Souter, J., dissenting).

Justice O'Connor emphasized the distinction between "true private-choice programs" and "per-capita school-aid programs." *Id.* at 2559 (O'Connor, J., concurring). The Ohio voucher program, like the programs in *Zobrest* and *Witters*, is a true private-choice program because the aid is given directly to eligible individuals, who in turn

decide where to spend it. The programs considered in *Mitchell* and *Agostini* were examples of per-capita school-aid programs because aid was distributed based on the number of students attending each school, regardless of whether the school was religiously based or not. Justice O'Connor concluded that true private-choice programs were more likely to survive Establishment Clause challenges, even though government aid was diverted to the religious schools, because " 'any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.' " *Id.* at 2558 (quoting *Witters*, 474 U.S. at 488) (O'Connor, J., concurring).

True private-choice programs, by their very nature, cannot have the forbidden "primary effect" of the government "advancing religion" because the aid is given directly to the beneficiary and that student or parent retains control over where the aid will be applied. "The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision." 120 S. Ct. at 2559. Furthermore, when government aid flows to a religious school as a result of "independent decisions made by numerous individuals . . . , no reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief." *Id.* (internal quotation marks and citation omitted).

The majority opinion in this case claims the voucher program "involves the grant of state aid directly and predominantly to the coffers of the private, religious schools." Slip op. at 27. Furthermore, according to the

majority, "there is no neutral aid when that aid principally flows to religious institutions. . . . " *Id.* at 27. The majority ignores that this view has been flat-out rejected by the Supreme Court in the decisions I have discussed which make it very clear that the *number* of religious schools participating in the voucher program, the thoroughness of the religious training that occurs there, and the use to which such schools might put the funds are all totally irrelevant to the question of the government's neutrality, when the government aid reaches a religious school only as a result of the recipient's " 'genuinely independent and private choice[ ].' " *See Mitchell,* 120 S. Ct. at 2541 (citation omitted); *Zobrest,* 509 U.S. at 8; *Witters,* 474 U.S. at 486. By ignoring the recent Supreme Court cases emphasizing the importance of genuinely independent and private choices and the distinction between true private-choice programs and per-capita school-aid programs, the majority has failed to conduct a "meaningful" independent analysis of the voucher program's constitutionality.

III.

In summary, and to repeat, according to the Supreme Court, a true private-choice program does not result in "governmental indoctrination" so long as the path of the government aid is determined by the " 'genuinely independent and private choice[ ]' " of the aid recipients. *See Mitchell,* 120 S. Ct. at 2541 (citation omitted); *id.* at 2557-60 (O'Connor, J., concurring); *Agostini,* 521 U.S. at 226; *Zobrest,* 509 U.S. at 10, 12; *Witters,* 474 U.S. at 488; *Mueller,* 463 U.S. at 397-98, 400.

Ohio's voucher program easily meets this test. Before a voucher is "spent" at a religious school, Cleveland parents must independently make two important choices:

First, they must decide whether their child will take advantage of the voucher alternatives at all, or select another option, such as remaining in the Cleveland schools, undertaking home schooling, or attending one of Cleveland's well regarded community schools. Second, if a child's parents choose the voucher option, they must make the further "genuinely independent and private choice[ ]" whether to use the voucher at a private school, nonreligious or religious, or for special tutoring in the Cleveland public schools. The voucher-use choice of attending a public school in a neighboring district is not presently available to Cleveland parents because no neighboring district has opted into the voucher program.

It is difficult to imagine how a voucher statute could be crafted that more clearly and decisively forecloses the government from having any role in the religious indoctrination of Cleveland school children, or forecloses it from defining the recipients of the vouchers by reference to religion, than through the range of free and independent choices the statute gives to the parents whose children attend the Cleveland public schools.

IV.

In striking down this statute today, the majority perpetuates the long history of lower federal court hostility to educational choice. It does so by reaching back to a

1973 Supreme Court decision, *Nyquist*, that construes a statute that is light years away from the voucher program before us and that rests upon law that has been altered in an important respect by subsequent Supreme Court decisions. My colleagues refuse to acknowledge that the program in *Nyquist* is factually distinguishable in essential ways from the Ohio voucher program and that the Supreme Court has explicitly declared that the criteria for determining whether a statute authorizing government aid to schools violates the Establishment Clause have changed. And then, almost as if recognizing that its *Nyquist*-is-directly-on-point argument cannot withstand close scrutiny, the majority resorts to the lamentable tactic of attempting to arouse support for its view by making the familiar but unworthy arguments that the voucher program has too many religious schools and that they are too religious. This argument should fail, first, because it is rooted in nativist hostility toward religious schools and, second, because it has been explicitly rejected by the Supreme Court as a legitimate determinant of whether a government is engaging in religious indoctrination.

Despite the majority's disclaimer that "courts do not make educational policy; we do not sit in omnipotent judgment as to the efficacy of one scheme or program versus another," slip op. at 9, the majority opinion is nothing more than an attack upon the philosophical and cultural desirability of publicly funded educational choice for the poor. This case and its result – sentencing nearly 4,000 poverty-level, mostly minority, children in Cleveland to return to the indisputably failed Cleveland public schools from which, in many cases, they escaped as long as three years ago – is an exercise in raw judicial

power having no basis in the First Amendment or in the Supreme Court's Establishment Clause jurisprudence.

In all events, a matter of this gravity and of such immense importance to the Cleveland children who are directly affected, and indeed to the nation, should not be determined by just two judges of this court. Therefore, I respectfully urge my colleagues to take this case for *en banc* review, if they are asked to do so, and decide the vitally important Establishment Clause issue it presents, after giving careful consideration to the full panoply of Supreme Court Establishment Clause jurisprudence, and not just one, inapposite 1973 case.

As to what is written in part IV of the majority opinion, I have no disagreement.

DORIS SIMMONS-HARRIS, et al., Plaintiffs v. DR. SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, Defendant; SUE GATTON, et al., Plaintiffs v. DR. SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, et al., Defendants

Case NO.: 1:99 CV 1740, Case No.: 1:99 CV 1818

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

72 F. Supp. 2d 834; 1999 U.S. Dist. LEXIS 19347; 78 A.L.R.5th 623

December 20, 1999, Decided

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For SENEL TAYLOR, JOHNIETTA MCGRADY, CHRISTINE SUMA, ARKELA IN HER OWN BEHALF AND AS NATURAL GUARDIAN OF HER CHILDREN, TANASHIA WINSTON AND DEVONTE WINSTON, AMY IN HER OWN BEHALF AND AS NATURAL GUARDIAN OF HER CHILD, AMBER LEE ANGELO, intervenors-defendants (99-CV-1740): David C. Tryon, Esq., Porter, Wright, Morris & Arthur, Cleveland, OH.

For SENEL TAYLOR, JOHNIETTA MCGRADY, CHRISTINE SUMA, ARKELA IN HER OWN BEHA[illegible] AND AS NATURAL GUARDIAN OF HER CHILDREN, TANASHIA WINSTON AND DEVONTE WINSTON, AMY IN HER OWN BEHALF AND AS NATURAL GUARDIAN OF HER CHILD, AMBER LEE ANGELO, intervenors-defendants (99-CV-1740): Clint Bolick, Esq., Richard Komer, Esq., Matthew Berry, Esq., Institute For Justice, Washington, DC.

For HANNA PERKINS SCHOOL, intervenor-defendant (99-CV-1740, 99-CV-1818): James D. Thomas, Esq., Squire, Sanders & Dempsey, David J. Hessler, Nathan E. Hessler, Esq., Wegman, Hessler, Vanderburg & O'Toole, Cleveland, OH.

For HANNA PERKINS SCHOOL, intervenor-defendant (99-CV-1740, 99-CV-1818): David J. Young, Esq., Michael R. Reed, Esq., Squire, Sanders & Dempsey, Columbus, OH.

For IVY CHAMBERS, CAROL LAMBERT, DELORIES JONES, OUR LADY OF PEACE CHURCH AND PAROCHIAL SCHOOL, WESTPARK LUTHERAN SCHOOL, intervenors-defendants (99-CV-1818): James D. Thomas, Esq., Squire, Sanders & Dempsey, David J. Hessler, Nathan E. Hessler, Esq., Wegman, Hessler, Vanderburg & O'Toole, Cleveland, OH.

For IVY CHAMBERS, CAROL LAMBERT, DELORIES JONES, OUR LADY OF PEACE CHURCH AND PAROCHIAL SCHOOL, WESTPARK LUTHERAN SCHOOL, intervenors-defendants (99-CV-1818): David J. Young, Esq., Michael R. Reed, Esq., Squire, Sanders & Dempsey, Columbus, OH.

For LUTHERAN MEMORIAL ASSOCIATION OF CLEVELAND, intervenor-defendant (99-CV-1818): James D. Thomas, Esq., Squire, Sanders & Dempsey, Cleveland, OH.

For LUTHERAN MEMORIAL ASSOCIATION OF CLEVELAND, intervenor-defendant (99-CV-1818): David J. Young, Esq., Michael R. Reed, Esq., Squire Sanders & Dempsey, Columbus, OH.

JUDGES:

Solomon Oliver, Jr., UNITED STATES DISTRICT JUDGE.

OPINION BY:

Solomon Oliver, Jr.

OPINION:

ORDER

I. INTRODUCTION AND FACTS

Plaintiffs brought this action seeking to enjoin permanently a portion of the Ohio Pilot Scholarship Program on the ground that it violates the Establishment Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment to the U.S. Constitution. All plaintiffs and all defendants in these consolidated actions have filed motions for summary judgment except for Intervenor/Defendant Hanna Perkins, who filed a brief in support of the other Defendants' motions for summary judgment. For the reasons set forth below, the court grants the Motions for Summary Judgment of Plaintiffs Doris Simmons-Harris, *et al.* and Plaintiffs Sue Gatton, *et al.* (Doc. Nos. 83 and 97, respectively), and denies the Motions for Summary Judgment of Intervening Defendants Senel Taylor, *et al.* and the State Defendants, *et al.* (Doc. Nos. 82 and 92, respectively). Accordingly, the State Defendants are permanently enjoined from administering the Voucher Program.

In 1995 the Ohio Legislature enacted a pilot scholarship program to address an educational crisis in Cleveland's public schools in the wake of a U.S. District Court-

ordered takeover of the administration of the Cleveland City School District (the "District") by the State. This program, as more fully discussed herein, was struck down by the Ohio Supreme Court as being in violation of the Ohio Constitution. The program was re-enacted in all pertinent respects by the Ohio Legislature in June 1999. The 1999 program is applicable, as was the 1995 program, to students residing in the District. The program has two components: a scholarship program to enable students to attend "alternative schools" ("Voucher Program" or "Program"); and a tutorial program for children attending the Cleveland Public Schools ("Tutorial Program"). Plaintiffs, while challenging the constitutionality of the Voucher Program, do not challenge the Tutorial Program in this action.[1]

Private schools within the geographic boundaries of the District and public schools adjacent to the District are eligible to participate in the Voucher Program as "alternative schools." In order to do so, private schools must register with the State Superintendent. Recipients are chosen by lot and receive a fixed percentage of the tuition charged by the alternative school of their choice, up to $2,500. Students whose family income is not more than 200% of the federally-established poverty level receive 90% of their school tuition; other scholarship recipients whose family income is above this threshold receive 75%

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[1] Tutorial grants may be used to obtain tutorial services for students enrolled in the Cleveland Public Schools. The same number of scholarships and tutorial grants must be awarded in a given year. The eligibility criteria for tutorial grants are the same as those for the scholarship grants, discussed below. The maximum allowable tutorial grant is $500.

of their tuition. Participating students may first enroll in the Program as early as when they enter kindergarten and must do so by third grade. Once admitted to the Program, they are eligible for scholarships through eighth grade. Disbursement of scholarship money to a private school is accomplished by the State sending a check to the chosen school made payable to the parents of the recipient; thereafter, the parents must endorse the check to the school. The State places no restriction on how the private school may utilize the money. In the event that an adjacent public school is involved, the State would issue a check made payable to the school district.

In the three years prior to the Ohio Supreme Court's holding the 1995 program unconstitutional, no public schools registered for the program. None have registered since the enactment of the Program in 1999. For the 1999-2000 school year, 3,761 students were to be enrolled in the Program. Sixty percent of these students are from families at or below the poverty level. At the beginning of the 1999-2000 school year, fifty-six schools were registered to participate in the Program. Forty-six of the schools, or over 82%, are church-affiliated.[2] Of the 3,761 students enrolled in the Program, 3,632, or over 96%, are enrolled in sectarian schools. Pl. J.A. vol. I, Ex. E.

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[2] The number of participating schools and number of participating religious schools were reached by Plaintiffs as a result of obtaining discovery from the State and the Hanna Perkins Intervenors/Defendants. O'Brien Aff. at ¶6, Pl. J.A. vol. I. Defendants do not dispute Plaintiffs' figures.

Religious characteristics vary from school to school, but participating schools share certain traits. For example, it can generally be said that a central part of each school's program is instruction in the theology or doctrine of a particular faith and that religion and religious doctrines are an integral part of the entire school experience. A review of several schools' parent handbooks perhaps provides better insight into the religious nature of the schools at issue.[3]

For example, Saint Patrick School includes in its Family Handbook the following:

PHILOSOPHY OF CATHOLIC EDUCATION

We believe that a philosophy of Catholic education begins with faith that God, in creating, gifted us with life. He became one of us in His Son Jesus, and in the person of His Spirit awaits our response to His unconditional overture of love. Jesus remains with the community He formed, witnessing and sharing the Good News in every age and with all people, ever yearning for a return of love either by a sincere response to conscience or by membership in His Church. It is from this perspective that the educational ministry of the Catholic community flows.

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[3] The parties have stipulated that the handbooks and mission statements produced by the schools participating in the Voucher Program "are authentic, speak for themselves, have been made available to the parents of the scholarship students and are not false or misleading." Stipulation by the parties of October 15, 1999, at 2.

* * * MISSION STATEMENT

St. Patrick School is a Catholic School in the Diocese of Cleveland, Ohio. The mission of St. Patrick School is to live and teach the Gospel message. We are dedicated to the formation of youth according to our Catholic Traditions within an innovative academic environment which provides students with the opportunity to develop spiritually, academically, and socially to the best of their abilities.

Objectives of Education

1. To communicate the gospel message of Jesus.

2. To provide opportunities to build and experience a faith community.

3. To orient students to the responsibility and experience of service because of their membership in the Christian community.

4. To provide students with opportunity for growth in prayer.

5. To provide instruction in religious truths and values in such a way that they become an integrated part of the school program.

6. To develop a faculty and staff who by their presence and teaching express an integrated approach to learning and living in their lives.

7. To provide an academic program and environment conducive to the optimal development of each student.

St. Patrick Handbook at 1, Pl. J.A. vol. III, Ex. I, Tab 26.[4] Additionally, all students are required to participate in religion classes, which are taught daily, and to attend all religious, liturgical, and para-liturgical celebrations. *Id.* at 10.

At St. Rocco School, "an integral part of the school program is instruction in religious truths and values. These values permeates [*sic*] the whole atmosphere of the school." St. Rocco School Handbook at 3, Pl. J.A. vol. III, Ex. I, Tab 27. Each student at St. Rocco School is expected to contribute a nominal amount for membership in the Society for the Propagation of the Faith. *Id.* at 11. Like St. Patrick School, "[a]ll students, whether Catholic or not, participates [*sic*] in religion classes, mass, religious activities, and receive a religion grade." *Id.* at 11. Parents are asked to help their children practice specific prayers at each grade level. For example, they are to teach their children the Sign of the Cross and the Hail Mary in kindergarten and the Our Father and Glory Be to the Father in first grade. *Id.*

St. Stanislaus School "is an integral part of the St. Stanislaus community whose shared mission with parents is to facilitate Christian values within the context of the core curriculum. [They] commit [them]selves to the formation of a faith-filled Catholic community, preparing students for spiritual development, and future roles as

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[4] These are the "goals for Catholic schools in the Diocese of Cleveland." Pl. J.A. vol. IV, Ex. J, Tab 2 at *v.* Thirty-four of the forty-six participating religions schools are affiliated with the Diocese. Pl. J.A. vol. I, Ex. B, Tab 3.

responsible, knowledgeable, productive Christian individuals." St. Stanislaus School Materials, Pl. J.A. vol. III, Ex. I, Tab 28. As one of its goals, "St. Stanislaus School will increase their Catholic Identity by developing opportunities for faith development of faculty and students." *Id.* As at St. Patrick and St. Rocco Schools, religion classes are taught daily at all grade levels and "non-Catholic students attending [the school] are expected to be a part of the religion program and activities throughout the year." *Id.* Likewise, students and their families "are expected and obligated to attend and participate in the week-end liturgy." *Id.*

The philosophy of education at St. John Nottingham Lutheran School is:

> It is our belief that the one cardinal objective of education to which all others point is to develop devotion to God as our Creator, Redeemer, and Sanctifier, whose love for us moves us to show in our every act, thought, word and desire, our love for Him.

"The Fear of the Lord is the Beginning of Knowledge." Proverbs 1:7.

St. John Nottingham Handbook at 2, Pl. J.A. vol. III Ex. I, Tab 34. Religion is taught at St. John Nottingham Lutheran through weekly worship chapel services, Bible studies, catechism, church history, confirmation instruction and memory. Additionally, the school teaches reading, mathematics, spelling, language, social studies, science and handwriting "with a Christ-centered approach." *Id.* at 14 (emphasis in original).

At St. Mark Lutheran School:

> The primary focus . . . is on our Lord and Savior, Jesus Christ. In all of our goals, Jesus Christ must be preeminent. Because of our commitment to that focus and to our beliefs and philosophy, it is highly inconsistent for any parents to send a child to this school if they:
>
> . Are not a Christian and/or are not interested in learning about Jesus Christ
>
> . Are not living a Christian life or willing to learn how to lead such a life
>
> . Are not a supporting part of a Christian congregation through worship and sharing of time and talents

St. Mark Handbook at 2, Pl. J.A. vol. III, Ex. I, Tab 35. All students at St. Mark are required to participate in daily religion classes and to "be instructed in the basic teachings of God's Word through an organized program of Christian education." *Id.* at 28. Each day begins with a classroom devotion and prayer and the school day is ended with classroom prayer. *Id.* Children also attend weekly chapel services.[5] *Id.*

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[5] By reciting only those portions of parent handbooks relating to religion, the court does not mean to diminish the importance of the instruction that each school participating in the Voucher Program offers in core subjects such as math, reading, science and social studies. Given the context within which this case is presented, however, the relevant question is not whether or how well these schools educate students in secular subjects, but whether the aid received through the Voucher Program violates the Establishment Clause. Accordingly, a review of the way in which religion is

II. PROCEDURAL HISTORY

Case No. 1:99 CV 1740 was filed on July 20, 1999, by Plaintiffs Doris Simmons-Harris, the parent of a minor child enrolled in the Cleveland City School District for the 1999-2000 school year; Marla Franklin, a teacher in the Lorain City School District; and Steven Behr, pastor of Our Savior/Nuestro Salvador Church in Lorain, Ohio, against Defendant Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education.

Case No: 1:99 CV 1818 was filed on July 29, 1999, by Plaintiffs Sue Gatton, chairperson of Citizens Against Vouchers; Mary Murphy, a teacher in the Cleveland City School District; Michael Debose, a pastor in Cuyahoga County, Ohio; Cheryl Debose and Glenn Altschuld, Ohio taxpayers; and Deidra Pearson, the parent of a child enrolled in the Cleveland City School District against Defendants Dr. Susan Tave Zelman, in her official capacity as Superintendent of Public Instruction for the Ohio Department of Education; the State of Ohio, through its General Assembly, Governor and other agents; and Sandra Berry, in her official capacity as Program Administrator for the Ohio Pilot Scholarship Program.

Two groups have intervened as defendants in both cases. The first group consists of parents of students who have been enrolled, or seek to enroll, in private schools under the Program. That group includes Senel Taylor,

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incorporated into the educational philosophy of participating schools is important to this court's analysis of the Voucher Program.

parent of a ten-year old child who has attended private school under the Program for the last two years; Johnnietta McGrady, parent of two children who seek to attend a private school under the Program; Christine Suma, parent of three children who have attended private school under the Program and one child who, at the time this action was filed, was on a waiting list to attend private school under the Program; Arkela Winston, parent of two children who have attended private school under the Program; and Amy Hudock, parent of a child who has attended private school under the Program for the past three school years.

The second group of intervenors includes nonpublic schools and parents of students who wish to participate in the Program. That group includes Hanna Perkins School, Our Lady of Peace School, Westpark Lutheran School, Lutheran Memorial Association of Cleveland, Ivy Chambers, Carol Lambert, and Delories Jones.

As is the case in the instant matter, Doris Simmons-Harris and Sue Gatton were the lead plaintiffs in the state court litigation challenging the 1995 program. The Plaintiffs challenged the 1995 program as a violation of the Establishment Clause of the First Amendment, and under several provisions of the Ohio Constitution.

The state trial court consolidated the two cases before it. On cross-motions for summary judgment, the court concluded that the 1995 program violated neither the United States Constitution nor the Ohio Constitution. The Plaintiffs then appealed the trial court's decision. In concluding that the 1995 program violated the Establishment Clause as well as one provision of the Ohio Constitution,

the appeals court reversed the trial court's decision. Thereafter, the Defendants appealed that decision to the Ohio Supreme Court.

The 1995 program was struck down by the Ohio Supreme Court in *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 711 N.E.2d 203 (Ohio 1999). The court held that the program was enacted in violation of Section 15(D), Article II, of the Ohio Constitution in "that creation of a substantive program in a general appropriations bill violates the one-subject rule" found in that provision. 711 N.E.2d at 216. The Ohio Supreme Court also addressed the federal constitutional issue raised in that case, whether the pilot program violated the Establishment Clause of the First Amendment. It concluded, contrary to the holding of the Ohio Court of Appeals, that it did not.

The Voucher Program was enacted by the Ohio Legislature on June 29, 1999, as part of the Education Budget Bill. *See* Ohio Rev. Code § 3313.974-3313.979 (Anderson 1999). It is, in all respects pertinent to this litigation, the same as the original pilot scholarship program enacted by the Legislature in 1995, which was operative for three successive school years. As detailed above, the first challenge to the 1999 Program, case no.1:99 CV 1740 was filed on July 20, 1999, and the second challenge, case no. 1:99 CV 1818, was filed on July 29, 1999.

On August 13, 1999, a preliminary injunction hearing was conducted in which the court entertained oral argument from counsel representing Plaintiffs in both cases, the State, and both groups of Intervening Defendants. After considering the submissions on behalf of all the parties and the arguments of counsel, this court issued its

twenty-eight page order on August 24, 1999, granting Plaintiffs' Motion for a Preliminary Injunction.

On August 27, 1999, the court granted a limited stay of its order enjoining the Program. The stay was made applicable only to those students who were enrolled in the 1995 program during the previous academic year and was granted only for one semester or until the court rendered a final decision on permanent injunctive relief, whichever first occurred. In light of the limited stay, the court set an expedited discovery and trial schedule.

The court conducted telephone conferences with counsel for all parties on September 3 and 17, 1999, in order to make changes as needed to the discovery and trial schedules set by the court in its August 27, 1999 order. As a result of those conferences, the following discovery schedule was established. On September 10, 1999, counsel for all parties were to exchange proposed factual stipulations and requests for documents. Prior to September 17, 1999, counsel for all parties were ordered to attempt to agree upon the factual record which would serve as a basis for the consideration of any summary judgment motions to be filed. In the event that counsel were unable to agree upon a factual record, they had until September 22, 1999, to serve formal discovery requests and notices of deposition. Written discovery responses were due October 8, 1999. All remaining discovery was to be concluded by October 29, 1999. The schedule for the briefing of dispositive motions was set as follows: (a) the dispositive motion deadline was November 1, 1999; (b) responses were due November 15, 1999; and (c) replies were due November 23, 1999. As in the court's August 27,

1999 order, trial was scheduled for December 13, 1999, at 9:00 a.m.

On August 24, 1999, the State appealed this court's order granting Plaintiffs' Motion for Preliminary Injunction to the Sixth Circuit Court of Appeals. Both Intervening Defendants also filed notices of appeal. All Defendants requested a stay of this court's preliminary injunction pending appeal. After this court's August 27, 1999 order granting a limited stay of its preliminary injunction, all Defendants filed revised briefs with the Sixth Circuit, appealing the preliminary injunction with regard to students who were new to the Voucher Program.

While the aforementioned motions were pending before the Sixth Circuit, the State filed a motion for a stay of the preliminary injunction with the United States Supreme Court. On November 5, 1999, by a vote of 5-4, the Supreme Court granted the State's motion. The complete text of that order read:

> Treating the application as a request for a stay of the preliminary injunction, the application for stay presented to Justice Stevens and by him referred to the Court is granted. The preliminary injunction entered by the United States District Court for the Northern District of Ohio, case No. 99 CV 1740, on August 24, 1999, is stayed pending final disposition of the appeal by the United States Court of Appeals for the Sixth Circuit.

Zelman, Superintendent of Pub. Instruction, et al. v. Simmons-Harris, Doris, et al., 120 S. Ct. 443, 145 L. Ed. 2d 346 (U.S. 1999).

On November 15, 1999, the Sixth Circuit entered an order, wherein it concluded that the Supreme Court's decision granting the State's motion for a stay rendered moot the Defendants' motions for stay pending in that Court. In light of the expedited schedule set by this court, the Sixth Circuit placed all appeals in this matter in abeyance pending this court's final determination of the case.

III. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an

> adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.
>
> However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof; so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In reviewing summary judgment motions, this court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252, 106 S. Ct. at 2512.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 274 U.S. App. D.C. 340, 863 F.2d 1029, 1034 (D.C.Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F.Supp. 1, 4 (S.D.Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id.*

IV. THE ESTABLISHMENT CLAUSE

A. History

In promulgating the First Amendment, the framers of the Bill of Rights sought to protect the colonists' right to be free from government inculcation of the theologies and doctrines of a faith to which they did not subscribe. James Madison, one of the authors of the First Amendment, feared that without such protection, the risk of governmental oppression intensified: "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private

rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents." James Madison to Thomas Jefferson, October 17, 1788, *reprinted in The Essential Bill of Rights* 326 (Gordon Lloyd et al. eds., University Press of America 1998) (emphasis in original). To Madison, the freedom to believe and practice the religion of one's choice was a fundamental right and was central to a bill of rights.

In his famous Memorial and Remonstrance in which he urged the State of Virginia to reject legislation which would financially support the propagation of Christianity as the state religion, Madison voiced his opinion on the proper relationship between government and religion: "[A] Government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any sect, nor suffering any Sect to invade those of another." James Madison's Memorial and Remonstrance, June 20, 1785, *reprinted in The Essential Bill of Rights, supra,* at 228. The basis for his belief that the two should remain separate was his fear of what would happen to citizens if the government were to use laws to regulate their beliefs:

> The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in

> exclusion of all other Religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Id. at 226.

Thomas Jefferson's convictions and concerns mirrored those of Madison. In his Statute of Religious Liberty, he spoke out against the dangers of requiring citizens to support a faith which was not their own: "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness. . . . " Jefferson's Statute of Religious Liberty, *reprinted in The Essential Bill of Rights, supra,* at 231.

Madison's and Jefferson's fears and concerns are reflective of those which resulted in the passage of the Establishment Clause – the first clause of the First Amendment of the U.S. Constitution. Its words are simple enough: "Congress shall make no law respecting an establishment of religion. . . . " Since its inception, though, the Establishment Clause has presented some of the most difficult questions of interpretation and application faced by the courts. As the Supreme Court has

stated, "in many of these decisions 'we have expressly or implicitly acknowledged that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.' " *Mueller v. Allen*, 463 U.S. 388, 393, 103 S. Ct. 3062, 3065-66, 77 L. Ed. 2d 721 (1983) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745 (1971)).

While Madison and Jefferson may have espoused a belief in a firm wall between church and state, "a hermetic separation of the two is an impossibility [the Court] has never required." *Roemer, III v. Board of Pub. Works of Maryland*, 426 U.S. 736, 746, 96 S. Ct. 2337, 2344, 49 L. Ed. 2d 179 (1976). The Supreme Court has "recognized that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian." *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 775, 93 S. Ct. 2955, 2967, 37 L. Ed. 2d 948 (1973). It is now clearly established that not every law which confers a benefit on a religious institution violates the Constitution. Some which confer only "indirect," "remote" or "incidental benefits" have been found to be constitutional. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947). While line drawing has been difficult in actual cases, a brief examination of some of the Supreme Court's Establishment Clause decisions provides a useful background for assessing the constitutionality of the Voucher Program.

The Court has approved tax deductions for the costs of bus transportation by students, regardless of whether

they attended public or private school, including parochial schools. *Id.* It also has approved the provision of textbooks at parochial schools when textbooks were not provided to students on the basis of whether they attended public or private school. *Board of Educ. v. Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968). Until recently, the Court held that public employees could not provide instruction in secular subjects, such as giving remedial and accelerated instruction on the premises of religious institutions. *See, e.g., Aguilar v. Felton*, 473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 105 S. Ct. 3216, 87 L. Ed. 2d 267 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997); *Meek v. Pittenger*, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975). However, the Court reversed itself on this issue in *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997).

The Court has generally held that a government cannot provide scholarship assistance to students which supports religious instruction or indoctrination. *Nyquist*, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948. However, it has approved of scholarship assistance where the aid to students is provided as part of a program made generally available without regard to the public-nonpublic or sectarian-nonsectarian nature of the schools to be benefitted. In such circumstances, aid ultimately supports the educational program of a religious institution only as the result of the private choice of the aid recipient. Consequently, there is no religious indoctrination attributable to the government. The Court has also found that the eligibility

criteria under this type of program are not such as to influence the recipient's choice of whether to attend a sectarian or nonsectarian institution. *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986); *Agostini*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391.

B. The Applicable Standard in Establishment Clause Cases

Before reaching the merits of the parties' respective claims, it is necessary to identify the standard under which these claims are properly analyzed. The applicable test used to analyze Establishment Clause challenges is grounded in the principles set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). In *Lemon*, the Supreme Court established the following three-part test:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster an excessive entanglement with religion.

403 U.S. at 612-13, 91 S. Ct. at 2111 (citations omitted). If the challenged legislation fails to meet any part of this test, it violates the Establishment Clause. While the *Lemon* test is generally accepted as the cornerstone of Establishment Clause analysis, limits on its effectiveness in analyzing the myriad of factual scenarios that arise in this area of the law have been recognized. *See Hunt v. McNair*, 413 U.S. 734, 741, 93 S. Ct. 2868, 2873, 37 L. Ed. 2d 923 (1973) (reasoning that the *Lemon* test provides "no more than [a]

helpful signpost" in analyzing Establishment Clause challenges.) Despite its perceived limitations, the Supreme Court has consistently applied this test in Establishment Clause challenges. *See Mueller*, 463 U.S. 388 at 394, 103 S. Ct. 3062 at 3066, 77 L. Ed. 2d 721; *Witters*, 474 U.S. at 485, 106 S. Ct. at 748.

Indeed, in *Agostini*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391, the Supreme Court recently reaffirmed the importance of the *Lemon* test in Establishment Clause cases. It confirmed the need to ascertain whether a law has a secular purpose and whether it has the effect of advancing religion, but altered the test's analytical structure by concluding that the "entanglement" prong should be considered as an aspect of the "effects" inquiry.

In collapsing the *Lemon* test from a three-prong to a two-prong inquiry, the *Agostini* Court also divided the second prong of the *Lemon* test into three specific subparts. According to *Agostini*, challenged governmental aid passes constitutional muster if it does not: "result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234, 117 S. Ct. at 2016. As discussed *infra*, in clarifying the "effects" prong of the *Lemon* test, the Court did not substantially alter the analysis to be applied in Establishment Clause challenges to programs in which the government provides funding that directly aids the educational function of religious schools. The analysis in those cases under the first and second prongs of the test is still grounded in the principles set forth in *Lemon* and in cases applying the *Lemon* test.

Plaintiffs contend that the Voucher Program is unconstitutional under *Nyquist*, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948, because it is factually indistinguishable from the tuition reimbursement program struck down in that case. They argue that the Voucher Program has the impermissible effect of advancing religion, as did the program at issue in *Nyquist*.[6] Defendants, on the other hand, argue that the Voucher Program is factually dissimilar from the program at issue in *Nyquist* and that this case should be governed by more recent Supreme Court cases in which the Court has found programs challenged under the Establishment Clause to be constitutional. In Section V, the court will review *Nyquist* and assess whether that case serves as precedent for this one and if so, whether the Voucher Program violates the Establishment Clause, as did the program in *Nyquist*. In Section VI, it will address Defendants' arguments that cases subsequent to *Nyquist* suggest there are meaningful distinctions between that case and this one.

V. THE VOUCHER PROGRAM UNDER *NYQUIST*

A. *Nyquist*

In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973), the Supreme Court found unconstitutional a New York State program intended to provide assistance, in several different forms, to nonpublic elementary and secondary schools. *Id.* The program contained three sections,

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[6] At the outset, it is important to note that Plaintiffs do not challenge the secular purpose of the Voucher Program.

only the second of which is directly relevant to the instant case. The first established direct money grants from the State to nonpublic, nonprofit elementary or secondary schools serving a high concentration of pupils from low-income families and was to be used for the maintenance and repair of school facilities. *Id.* at 762, 93 S. Ct. at 2960. The second section was a tuition grant program, which provided for partial tuition reimbursements to low-income parents whose children attended elementary or secondary nonpublic schools. *Id.* at 764, 93 S. Ct. at 2961. The last section gave some limited state income tax relief to parents who did not qualify for reimbursement grants. *Id.*

The tuition reimbursement program in *Nyquist* applied to parents of children who attended all private schools, not just private, sectarian schools. The reimbursement grants were limited to $50 for each grade school child and $100 for each high school child. *Id.* Only parents with an annual taxable income of less than $5,000 qualified for reimbursement. *Id.* In order to receive payment, a parent was required to submit a verified statement to the Commissioner of Education containing a receipted tuition bill. Reimbursements by the State could not exceed 50% of the tuition paid by the parents. *Id.*

Nearly 20% of New York State's elementary and secondary population attended over 2,000 nonpublic schools, and approximately 85% of these schools were church-affiliated.[7] *Id.* at 768, 93 S. Ct. at 2963. While no

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[7] It appears that the religious nature of a school was in part ascertained by reviewing New York State Education

detailed factual record was developed in the underlying cases, the *Nyquist* Court noted that several pertinent generalizations could be made about the benefitted schools. The qualifying institutions could incorporate a number of religious characteristics, including:

> (a) imposition of religious restrictions on admissions; (b) requiring attendance of pupils at religious activities; (c) requiring obedience by students to the doctrines and dogmas of a particular faith; (d) requiring pupils to attend instruction in the theology or doctrine of a particular faith; (e) [that the school is an] integral part of the religious mission of the church sponsoring it; (f) [that the school] has a substantial purpose the inculcation of religious values; (g) imposition of religious restrictions on faculty appointments; and (h) imposition of religious restrictions on what or how the faculty may teach.

Id. at 768, 93 S. Ct. at 2963 (quoting *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 350 F.Supp. 655, 663 (S.D.N.Y.1972)). However, the Court made clear that "the characteristics of individual schools [could] vary widely from [this] profile." *Id.*

Applying the *Lemon* test, the Court first found that the tuition grant program easily passed the secular purpose test. The articulated purposes of the program were to promote pluralism and diversity among New York's public and nonpublic schools and to alleviate the concern

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Department records and determining whether such records identified a given school as church-affiliated. *See Nyquist*, 413 U.S. at 768 n.23, 93 S. Ct. at 2963 n.23.

that the State's overburdened public school system would suffer significant harm if a large portion of children who had been attending nonpublic schools decided to return to the public schools.

Under the "effects" prong of the *Lemon* test, the Supreme Court found the tuition reimbursement program, "designed to allow direct, unrestricted grants of $50 to $100 per child . . . as reimbursement to parents in low-income brackets who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation, "violated the Establishment Clause of the First Amendment. *Id.* at 780, 93 S. Ct. at 2969. There was no doubt, held the Supreme Court, that such grants "could not, consistently with the Establishment Clause, be given directly to sectarian schools. . . . " *Id.* The defendants argued that the program should be saved because the aid was delivered to the parents and was not given directly to the benefitted schools. *Id.* at 781, 93 S. Ct. at 2969. As support, they maintained that New York's tuition reimbursement program was similar to programs upheld by the Court in *Everson v. Board of Educ.*, 330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711 (1947), and *Board of Educ. v. Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968). In *Everson*, the Court upheld tax deductions for parents who expended bus fare for children who attended religious schools. The *Allen* Court upheld the furnishing of text books for children who attended parochial schools. In both cases, grants went directly to parents, and not to schools.

The *Nyquist* Court rejected the notion that the tuition deduction program was consistent with the Establishment Clause simply because aid went to the parents and

not directly to the schools. As the Court explained, whether aid goes through parents or is given directly to schools is only one of many factors to be considered in determining whether or not a given program is unconstitutional. To clarify, the Court detailed the reasons why the programs upheld in *Everson* and *Allen* were significantly different from the nature of the tuition grants involved in *Nyquist:*

> In *Everson,* the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. Such services, provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses.

413 U.S. at 781-82, 93 S. Ct. at 2970 (citations omitted).

Contrary to the grants at issue in *Everson* and *Allen,* the tuition grants in *Nyquist* were not restricted to supporting only secular aspects of a school's educational program. *Id.* at 783, 93 S. Ct. at 2971. There was no attempt to separate secular from religious educational functions and to ensure that the monies provided by the State supported only the former. Concluding that the program had the impermissible effect of advancing religion, the Court stated:

> Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid – to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools – are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.

Id.

Because the Court found that the tuition grant program at issue in *Nyquist* had the primary effect of advancing religion, it did not address the third prong of the *Lemon* test, whether the program fostered excessive entanglement between church and state.

Before analyzing the Voucher Program under *Nyquist*, it is important to note that the *Nyquist* Court found it significant that:

> [b]ecause of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. Thus,

> our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the 'G.I. Bill' impermissibly advances religion in violation of the Establishment Clause.

Id. at 782 n.38, 93 S. Ct. at 2970 n.38 (citations omitted). This language has been often-quoted in post-*Nyquist* Establishment Clause cases in which the Court has concluded that the challenged programs were constitutional. As discussed below, Defendants argue that this case should be governed by these post-*Nyquist* cases because the Voucher Program is the type of program contemplated by the Court in footnote 38.

B. The Voucher Program

1. The Purpose of the Program

As in *Nyquist*, there is no question that the Voucher Program passes the secular purpose prong of the *Lemon* test. Indeed, as previously noted, Plaintiffs do not challenge the secular purpose of the legislation. Similar to *Nyquist*, the Program seeks to provide nonpublic school alternatives primarily to low-income students for acceptable reasons. Nevertheless, "the propriety of a legislature's purposes may not immunize from further scrutiny a law which . . . has the primary effect that advances religion." *Id.* at 774, 93 S. Ct. at 2966. Thus, the next inquiry is whether the Voucher Program has the effect of advancing religion.

2. The Effect of the Program

The Voucher Program is clearly similar to the tuition reimbursement program in *Nyquist* in two respects. First, while both public and private schools are eligible, only private schools have chosen to participate in the Program, and the vast majority of them are parochial. Like *Nyquist*, where 85% of the benefitted schools were parochial, over 82% of the schools participating in the Voucher Program are religiously affiliated. Thus, as in *Nyquist*, the "bulk of" the aid under the Voucher Program flows to schools which are "sectarian in orientation." *Id.* at 780, 93 S. Ct. at 2969. Second, as in *Nyquist*, the Voucher Program provides unrestricted tuition grants to parents whose children are eligible for the Program and who attend qualifying schools. Like the program in *Nyquist*, there " 'has been no endeavor to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former.' " *Id.* at 783, 93 S. Ct. 2971-72 (quoting *Lemon*, 403 U.S. 602 at 613, 91 S. Ct. at 2111).

Defendants, however, argue that the programs are dissimilar in several ways which would require that the Voucher Program be upheld whereas the *Nyquist* program was struck down. First, the Intervening Defendants argue that even if the large majority of schools participating in the Voucher Program is sectarian, the Program is constitutional because the primary focus of the schools is secular education. They maintain that Voucher schools actually educate their students better than do public schools, asserting that "if . . . Scholarship children receive a superior secular education and become better citizens because of their parent's school choice, the primary effect

of the Program is secular rather than religious."[8] Def. Hanna Perkins Motion at 4-12.[9]

The *Nyquist* Court squarely addressed this argument. Focusing on the term "primary," defendants there asserted that the Court had to decide whether the New York law had the "primary effect" of subsidizing religion or promoting the secular objectives the Court found to be legitimate. In holding that a finding of the former did not necessarily preclude a finding of the latter, the Court said: "We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." *Id.* at 783 n.39, 93 S. Ct. at

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[8] Along the same lines, the State spends nearly one-third of its brief explaining how the primary effect of the Voucher Program is to provide experimental data on whether the availability of such a program will improve educational opportunities for disadvantaged students. According to the State, if a private school adequately teaches core secular subjects, "then the mere fact that . . . [the] school also teaches religion to its students cannot mean that the private school now suddenly serves the State's secular goals less well than if it did not add religion to its teaching," Def. State Motion at 30.

[9] As cited herein, the various briefs in support of the parties' respective positions are abbreviated as follows:

(1) briefs in support of motions for summary judgment are cited as "motion";

(2) briefs in opposition to motions for summary judgment are cited as

(3) reply briefs are cited as "reply".

2971 n.39. Thus, even if it could be demonstrated that students participating in the Voucher Program receive a superior education to children in the Cleveland Public Schools, this fact does not obviate this court's duty to further question whether the Program also has the direct and immediate effect of advancing religion.

Second, citing to only several of the most religiously restrictive characteristics in the "profile" developed by the *Nyquist* Court, Defendants seek to distinguish that case by arguing that the schools participating in the Voucher Program do not exhibit each and every characteristic set forth in the *Nyquist* profile. Specifically, they argue that whereas the benefitted schools in *Nyquist* placed religious restrictions on admission, over sixty percent of the students in the Voucher Program are not of the same faith as their school's sponsor.

There is nothing in the *Nyquist* opinion to suggest that a program of this type runs afoul of the Establishment Clause only when the schools have the exact profile as in that case. The Court made clear that not each of the schools fit the profile, explicitly stating that "the characteristics of individual schools may vary widely from [the] profile." *Id.* at 768, 93 S. Ct. at 2963. More importantly, the *Nyquist* Court clearly did not rely on the fact that the schools in *Nyquist* were "extremely," as opposed to only "moderately" or "mildly" religious in reaching its conclusion. The relevant inquiry was whether schools were sectarian or nonsectarian. The *Nyquist* Court made this determination in part by reviewing the New York State Education Department records to identify whether such records listed a given school as church-affiliated. *Id.* at 768 n.23, 93 S. Ct. at 2963 n.23. The Court's conclusion

that the vast majority of benefitted schools were sectarian was central to its finding that the program in *Nyquist* had the impermissible effect of advancing religion.

Finally, Defendants contend that because of the religious restrictions on admission, public school pupils could not enroll in the sectarian schools at issue in *Nyquist*. They maintain that this meant the sectarian schools in *Nyquist* received more money to educate their existing pupils in the same manner, thus acquiring extra funds to spend on religious icons, clergy salaries and the like. On the other hand, they argue, Voucher schools receive no such extra money because they must accept new, financially deprived children who are below grade level and need significant remedial assistance. According to Defendants, educating students with such needs costs the schools more than the payment they receive under the Voucher Program. *See, e.g.*, Def. Hanna Perkins Reply at 3; Def. Hanna Perkins Motion at 17. Furthermore, Defendants assert that the group who receives any "extra" money is parents, who are likely to spend it on "essential food, utilities or clothing." Def. Hanna Perkins Reply at 3-4.

Defendants' argument is not well-taken. The *Nyquist* program did not increase the amount of tuition received by the schools; it merely changed the source from which the tuition originated. That is, the State relieved the parents of their existing tuition bills. Moreover, Defendants' argument incorrectly assumes that the money the Voucher schools receive as a result of the tuition grants will be used only for secular purposes. However, the tuition grants under the Voucher Program, like those in *Nyquist*, are unrestricted and can be used for any purpose

a school finds necessary. That the grants do not fully compensate the schools for the cost of educating the children they accept under the Program does not alter this fact. Additionally, it is irrelevant that the funds in this case will benefit the parents of Voucher students. Parents clearly benefitted under the *Nyquist* program, as they do here. Nevertheless, as in *Nyquist*, the court must evaluate whether the Program *also* benefits the participating schools in such a way as to impermissibly foster religion.

Taken together, the fact that the Voucher Program overwhelmingly benefits sectarian schools and that the grants provided under the Program are not restricted to supporting only secular functions of a participating school's educational program make it indistinguishable for Establishment Clause purposes from the tuition reimbursement program in *Nyquist*. As in *Nyquist*, the funds provided under the Voucher Program directly aid the religious function of participating schools. In fact, the state aid under the Voucher Program provides an even more direct benefit to religious schools than did the aid in *Nyquist*. Even though parents must endorse their checks to the schools, the aid is given directly to participating schools. It can fairly be said that because the Program does not make aid available generally without regard to the nature of the institution benefitted, the Voucher Program results in government-sponsored religious indoctrination. Indeed, the Court's ultimate analysis of the *Nyquist* program under the "effects" test can be applied in this case by merely substituting "Ohio" for "New York": "It is precisely the function of [Ohio's] law to provide assistance to private schools, the great majority

of which are sectarian. . . . The effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." *Id.* at 783, 93 S. Ct. at 2971.

C. *Nyquist* Has Not Been Overruled

To the extent that Defendants argue implicitly in their motions for summary judgment, as they argued explicitly in their oppositions to Plaintiffs' motions for a preliminary injunction, that *Nyquist* has been "undermined" by a series of subsequent Supreme Court cases and should not be followed, the court must reject the argument. Since the court finds that *Nyquist* is directly relevant precedent, it is "constrained to follow it." *Simmons-Harris v. Zelman*, 54 F. Supp. 2d 725, 735 (1999). In deciding to overrule one of its own precedents, the Supreme Court recently stated in *Agostini*:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "if a precedent to this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, ***the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.***"

Agostini, 521 U.S. at 237, 117 S. Ct. at 2017 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22, 104 L. Ed. 2d 526 (1989) (emphasis added). Thus, it is not within the power

of this court to declare that a case decided by the United States Supreme Court should be overruled.

VI. ESTABLISHMENT CLAUSE JURISPRUDENCE SINCE *NYQUIST*

As previously discussed, the *Nyquist* Court did not have before it the type of case contemplated in footnote 38, wherein funds are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Nyquist*, 413 U.S. at 782 n.38, 93 S. Ct. at 2970 n.38. However, the Court was later confronted with just such a scenario in several cases following *Nyquist*. The dispute in the instant matter revolves around Defendants' contention that the Voucher Program fits within footnote 38 and cases following *Nyquist*. Accordingly, the court turns to a discussion of whether recent cases suggest there is a meaningful distinction between the program struck down in *Nyquist* and that which is being challenged in this case.

A. *Mueller*

In *Mueller v. Allen*, 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983), the U.S. Supreme Court upheld the constitutionality of a Minnesota statute which allowed state taxpayers to deduct, when computing their state income tax, certain tuition, transportation and educational expenses actually incurred in sending their children to elementary or secondary schools. It found that the program complied with each of the three parts of the

Lemon test. The court determined that the program had a secular legislative purpose, stating:

> A state's decision to defray the cost of educational expenses incurred by parents – regardless of the type of schools their children attend – evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well educated. Similarly, Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden – to the benefit of all taxpayers.

Id. at 395, 103 S. Ct. at 3067.

The Court also concluded that the program did not have the primary effect of advancing religion. First, it explained that the tax deduction was one of many provided under the Minnesota tax laws and that its:

> decisions consistently have recognized that traditionally 'legislatures have especially broad latitude in creating classifications and distinctions in tax statutes,' in part because the 'familiarity with local conditions' enjoyed by the legislators especially enables them to 'achieve an equitable distribution of the tax burden.' Under our prior decisions, the Minnesota legislature's judgment that a deduction for educational expenses fairly

> equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference.

Id. at 396, 103 S. Ct. at 3067-68 (citations omitted).

According to the Court, it was especially significant that the deduction was available for education expenses incurred by all parents, whether their children attended public schools, nonsectarian private schools or sectarian private schools. *Id.* at 397, 103 S. Ct. at 3068. The Court found this aspect of the statute, as well as others, to be "vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants was provided only to parents of children in nonpublic schools." *Id.* at 398, 103 S. Ct. at 3068. The Court found the tax deduction involved to be more like the type of program contemplated in footnote 38 of *Nyquist*, wherein the Court "intimated that 'public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited,' might not offend the Establishment Clause." *Id.* (citation omitted).

While acknowledging that "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children," central to the Court's reasoning was the fact that the assistance to parochial schools was channeled through parents rather than directly provided to the schools. *Id.* at 399, 103 S. Ct. at 3069. In *Mueller*, the nature of the program at issue necessarily incorporated several significant steps between the aid provided by Minnesota and the benefit religious schools

might indirectly receive from such aid. Although the Court did not explicitly delineate these steps, some of them are apparent. At the outset, parents had to decide whether to send their child to public or private, tuition-charging schools. Next, they had to determine whether their child should attend a sectarian or nonsectarian private school. Once their child was enrolled in a private school, the tuition bill was due from parents up-front. Before being able to reap its benefits, it was necessary that parents become aware of the tuition deduction. Finally, it was not certain that because their child attended a private school, parents would automatically take the deduction; rather, parents had to make the choice to take advantage of it. As the Court explained, "the historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." *Id.* at 400, 103 S. Ct. at 3070.

Because the Court found that the program in *Mueller* "neutrally provided state assistance to a broad spectrum of citizens" and because "under Minnesota's arrangement public funds became available only as a result of numerous, private choices of individual parents of school-age children," it concluded that the program did not have the primary effect of advancing religion. *Id.* at 398-99, 103 S. Ct. at 3069.

Defendants argue that because the Court in *Mueller* indicated it would not base the constitutionality of a program on the consideration of yearly statistical evidence reflecting the extent to which nonsectarian schools

might benefit from the tax deduction,[10] this court should not consider statistical evidence indicating the number of parochial schools involved in the Program. Defendants also contend that the Voucher Program complies with the dictates of *Mueller* and footnote 38 of *Nyquist* because it is a facially neutral program. Defendants assert that, because the Program is facially neutral, the challenged aid is made generally available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted. Therefore, they argue, any benefit received by a sectarian institution is received as a result of the private choice of the individual parents.

Contrary to Defe[illegible]s' assertions, *Mueller* cannot fairly be read as repudiating the obligation of the courts in the first instance to see whether the state program is indeed genuinely neutral. The *Mueller* Court's refusal to

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[10] Defendants base this argument on the following language from the *Mueller* opinion:

> We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of; nor can we perceive principled standards by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled – under a facially neutral statute – should be of little importance in determining the constitutionality of the statute permitting such relief.

Mueller, 463 U.S. at 401, 103 S. Ct. at 3070.

consider annual reports reciting the number of parents who availed themselves of the tax deduction at issue must be evaluated in the entire context of its decision. Over the dissent of Justices Marshall, Brennan, Blackmun and Stevens, the Court found, on analysis, that the tax deduction was "made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institutions benefitted" and that it benefitted religious institutions "only as a result of numerous private choices of individual parents of school-age children." 463 U.S. at 399, 103 S. Ct. at 3069. These two facts meant that the link between state aid and the religious schools was sufficiently attenuated such that the receipt of the tax deduction by private citizens did not offend the Establishment Clause. *See id.* ("Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval,' can be deemed to have been conferred on any particular religion, or on religion generally." (Citation omitted)). In light of this conclusion, it follows that a statistical analysis indicating how many private citizens took advantage of the tax deduction could not weigh into the Court's analysis of the challenged statute's constitutionality. Whether 5% or 100% of students taking advantage of the deductions attended religious schools was of no constitutional consequence in the face of a determination by the Court that the options were neutral and that any aid benefitting religious institutions was the result of private choice.

Consideration of the number and percentage of sectarian schools participating in the Voucher Program is not forbidden by *Mueller*. Assessing the choices available to students in the Program by determining the number of

participating religious schools versus the number of participating nonreligious schools is very different than annually taking account of the number of students who have availed themselves of a particular option. In other words, determining whether an aid recipient has neutral options available under a program is not the same as probing how the recipient has chosen to exercise those options. Indeed, the Court has employed a prospective analysis in *post-Mueller* Establishment Clause challenges in an effort to determine the availability of neutral options under a program. *See e.g., Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 488, 106 S. Ct. 748, 752, 88 L. Ed. 2d 846 (1986) (finding it significant that "the full benefits of the program [were not] limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients had full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian.").

Defendants' reliance on *Mueller* for the proposition that the court should consider only the face of the relevant statute is also misplaced. On numerous occasions, the Supreme Court has held that, by itself, facial neutrality is insufficient to clear the effects test. For example, in *Bowen v. Kendrick*, 487 U.S. 589, 609-10, 108 S. Ct. 2562, 2574, 101 L. Ed. 2d 520 (1988), the Court concluded:

> Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions

> does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are "pervasively sectarian."

In *Roemer, III v. Maryland Pub. Works Bd.*, 426 U.S. 736, 747, 96 S. Ct. 2337, 2345, 49 L. Ed. 2d 179 (1976), the Court held:

> Neutrality is what is required. The State must confine itself to secular objectives, and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied. The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.

See also Rosenberger v. Rector and Visitors of the Univ. of Virginia et al., 515 U.S. 819 at 846, 115 S. Ct. 2510 at 2525 132 L. Ed. 2d 700 (1995) (O'Connor, J., concurring) ("Neutrality, in both form and effect, is one hallmark of the Establishment Clause.").

Mueller itself adheres to this principle. The Court explicitly followed each step of the *Lemon* test – once it determined the program at issue had a secular purpose, it "turned . . . to the more difficult but related question whether the Minnesota statute had 'the primary effect of advancing the sectarian aims of the nonpublic schools.' " *Id.* at 396, 103 S. Ct. at 3067 (quoting *Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 662, 100 S. Ct. 840, 851, 63 L.

Ed. 2d 94 (1980) and *Lemon*, 403 U.S. at 612-13, 91 S. Ct. at 2111). The Court determined that the program, *in addition* to being facially neutral, was also neutral in application because aid was provided without regard to the nature of the institutions benefitted and because aid only flowed to religious institutions as a result of the independent choices of parents. Accordingly, the program did not have the primary effect of advancing religion.[11]

On analysis of the Voucher Program's form and effect, the court finds it distinguishable from *Mueller* in at least two pertinent respects. First, under the Voucher Program, parents and their children do not have a significant choice between parochial and nonparochial schools. The Program is structured such that eligible schools become registered schools only if they choose to accept the government's invitation to participate. Although the Voucher Program lists several adjacent school districts as eligible schools, none have registered for the Program. Because analysis of the Program's constitutionality requires consideration of where the challenged aid actually flows, the court is obligated to consider only registered schools, not eligible schools. Among registered schools, parochial schools overwhelmingly predominate. Therefore, this Program is unlike the tax program in

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[11] Although Defendants also argue that the Tutorial Program contributes to the facial neutrality of the Voucher Program, they fail to assert how it contributes to the Voucher Program's neutrality in application. Accordingly, inasmuch as the court has concluded that facial neutrality is insufficient to satisfy the "effects" test, Defendants' argument relative to the Tutorial Program is not well-taken.

Mueller where parents and children could make an independent choice between public and private schools, including religious schools, and where parents received a tax deduction for expenses associated with attendance at either.[12] Second, because parents of children in the Voucher Program do not have a significant choice between parochial and nonparochial schools, the nature of that choice is not sufficient to break the nexus between the government and the religious institution. Thus, parental choice under the Voucher Program is unlike that in *Mueller*, where the aid was found to be neutral and made available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions benefitted.

B. *Witters*

The Supreme Court, in *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986), upheld the constitutionality of a State of Washington program extending vocational rehabilitation assistance to a blind person attending a Christian college to become a pastor, missionary or youth director. The program at issue authorized the Washington Commission for the Blind to "provide for special education and/or training in the professions, business or trades so as to

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[12] Citing with approval to the factual findings of the lower courts in that case, the Court in *Mueller* detailed "a range of educational expenses" for which parents of public school children may claim the tax deduction. *See Mueller*, 463 U.S. at 391 n.2, 103 S. Ct. at 3064 n.2. This appeared central to the Court's conclusion that the program was neutral.

assist visually handicapped persons to overcome vocational handicaps and to obtain the maximum degree of self-support and self-care." *Id.* at 483, 106 S. Ct. at 749 (citation omitted). The plaintiff in *Witters* wished to apply his grant to defray his tuition costs at the Inland Empire School of the Bible, the private Christian college where he was studying.

The Court had no trouble determining that the program satisfied the first part of the *Lemon* test. As the court explained, the purpose of the Washington program was "unmistakably secular [in that it] . . . was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services." *Id.* at 485, 106 S. Ct. at 751. Further, the Court specifically noted that "no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education." *Id.* at 486, 106 S. Ct. at 751.

In addressing the effects prong of the test, the Court stated:

> The question presented is whether, on the facts as they appear in the record before us, extension of aid to petitioner and the use of that aid by petitioner to support his religious education is a permissible transfer similar to the [constitutionally permissible] hypothetical salary donation [by a public employee to a religious institution], or is an impermissible "direct subsidy."

Id. at 488, 106 S. Ct. at 751. Unlike the *Nyquist* program, the vocational assistance program at issue did not amount to a direct subsidy because "any aid provided under Washington's program that ultimately flowed to

religious institutions did so only as a result of the genuinely independent and private choices of aid recipients." *Id.*

In reaching the conclusion that the link between the religious institution and the State was sufficiently attenuated, the Court found several aspects of the program pertinent. First, the vocational assistance was paid directly to the student, who could expend his or her education grant on wholly secular education if he or she wished. The program did not create a financial incentive for students to attend sectarian institutions because it did not provide any greater or broader benefits to students who chose to apply their aid to religious education. It was significant that:

> the full benefits of the program [were not] limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients had full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so. Aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian. . . . Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education.

Id.

Upon analysis, the Court found that Washington's program fit within footnote 38 of *Nyquist* because "Washington's program is 'made available generally without regard to the sectarian-nonsectarian, or public-

nonpublic nature of the institution benefited.' *Committee for Pub. Educ. & Liberty v. Nyquist*, 413 U.S. at 782-83 n.38, 93 S. Ct. at 2970 n.38, and is in no way skewed toward religion. . . . " *Id.* As the Court determined, "the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education [does not] confer any message of state endorsement of religion." *Witters*, 474 U.S. at 489, 106 S. Ct. 748 at 752, 88 L. Ed. 2d 846.

Defendants point to *Witters* as support for essentially the same arguments they raise in connection with *Mueller*. As the Senel-Taylor Intervenors/Defendants state, *Witters* "stands for the proposition that a facially neutral program that offers benefits to a class defined without reference to religion does not have a primary effect of advancing religion where any aid to religion results from the private choices of individual beneficiaries, even where a very high proportion of the beneficiaries are using their benefits to pursue a religious option." Def. Taylor Opp. at 14. The court does not disagree with this statement. Nevertheless, it does not agree that *Witters* should change the outcome of this case.

The court first incorporates its discussion regarding *Mueller* herein as much of it directly relates to Defendants' contentions with regard to *Witters*. Next, it will briefly explain why *Witters* is perhaps even easier to distinguish from the instant case than *Mueller*. First, in *Witters*, the student had a genuine choice between attending sectarian or nonsectarian and public or nonpublic institutions. Indeed, he had a choice between pursuing religious and nonreligious vocations, and as a practical matter, had a great many more nonreligious options.

Because he could utilize the aid however he chose, the provision of the scholarship would have no effect on his choice of an institution. Benefits would not accrue "in large part or in whole" to students at sectarian institutions. In fact, under the program, only a "minuscule" amount of aid would ever flow to religious institutions, and the program was not in any way skewed toward religion. Though religious institutions might ultimately benefit, it would be only as a direct result of the choice of recipients, not as the result of the State directly providing a benefit. To the contrary, students in the Voucher Program have no meaningful choice between attending sectarian or nonsectarian schools. That choice is essentially made for them as a function of the fact that almost all participating schools are religious in nature. Unlike in *Witters*, nearly all state aid under the Voucher Program will flow to religious institutions. It cannot be said that this aid flows to those institutions as a result of the choice of the Program beneficiaries since nearly all the schools participating are religious. Accordingly, it is not true, as it was in *Witters*, that the Voucher Program "is in no way skewed toward religion;" in fact, just the opposite is true here. Thus, *Witters* does not apply to this case because it is not true under the Voucher Program that "aid to religion results from the private choices of individual beneficiaries."

C. *Zobrest*

In *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993), the Supreme Court held that providing the services of an interpreter to a deaf

student attending a Catholic high school pursuant to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1407 *et seq.*, and its Arizona counterpart did not violate the Establishment Clause. The student had previously attended public school where he was furnished such an interpreter.

Holding that the reasoning of *Mueller* and *Witters* applied to the program at issue, the Court found that the effect of the government program was not to promote religion. *Id.* at 10, 113 S. Ct. at 2467. Rather, the services at issue were part of a general program that "distributed benefits neutrally to any child qualifying as 'disabled' under IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attended." *Id.* The Court reasoned:

> by according parents freedom to select a school of their choice, the statute insures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking.
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> * * *
>
> When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is no way skewed toward religion,' it follows under our prior decisions that provision of that service does not offend the Establishment Clause.

Id. (citations omitted). Indeed, the Court found the case to be easier than *Mueller* and *Witters* because no state monies that were traceable to the government ever went to religious institutions. *Id.*

It was also significant that the IDEA did not relieve the school at which the student wished to utilize the services of his interpreter of an expense it otherwise would have assumed in educating its students. *Id.* at 12-13, 113 S. Ct. at 2468-69. In other words, the Court intimated that even programs in which money does not directly flow to the coffers of a religious institution can still violate the Establishment Clause if aid is provided in such a way as to free up institution funds that would otherwise have been expended on essential, religious or nonreligious, functions. However, because the IDEA neither gave money directly to schools nor relieved them of expenses they would otherwise have borne, it did not amount to an impermissible direct subsidy to sectarian institutions. As the Court explained, because aid only went to religious institutions as a result of the genuinely independent choices of recipients, "disabled children, not sectarian schools, [were] the primary beneficiaries of the IDEA; to the extent sectarian schools benefitted at all from the IDEA, they [were] only incidental beneficiaries. Thus, the function of the IDEA [was] hardly to provide desired financial support for nonpublic, sectarian institution." *Id.* at 13, 113 S. Ct. at 2469 (citation omitted).

Finally, the Court reasoned that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Id.* It would not assume that the sign-language interpreter would do anything more than "accurately interpret whatever material

[was] presented to the class as a whole." *Id.* As the Court stated, "ethical guidelines require interpreters to transmit everything that is said in exactly the same way it was intended." *Id.* Any argument by Defendants that the Voucher Program is constitutional under *Zobrest* is not well-taken. As discussed above, the Voucher Program is not neutral because it does not make aid available generally without regard to the nature of the institutions benefitted. Since more than 82% of the schools participating in the Program are sectarian in nature, it also cannot be said that aid only flows to sectarian institutions as a result of the genuine and independent choice of aid recipients. Furthermore, unlike the IDEA, the Program does directly subsidize sectarian institutions. Because all monies under the Program flow directly to the coffers of religious schools, it is unnecessary to take the next step as the Court did in *Zobrest* and determine whether the Program relieves the schools of expenses they otherwise would have had to bear. Moreover, as the funds are unrestricted, there are no safeguards in the Voucher Program to ensure that they will be used only for secular instruction. Finally, it is important that *Zobrest* is factually dissimilar from this case. Central to the Court's decision was a rejection of the notion that the presence of a public employee in a sectarian school automatically violates the Establishment Clause, especially in the case of a sign language interpreter, who could neither add to nor subtract from the learning environment. On the other hand, where a school receives direct, unrestricted funds for its educational program, it hardly can be said that such aid does not result in indoctrination.

D. *Agostini*

The most recent case to hold that a governmental program which provided benefits to religious schools withstood an Establishment Clause challenge is *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). In that case, the Supreme Court overruled its prior decisions in *Aguilar v. Felton*, 473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997); and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400, 105 S. Ct. 3216, 3231, 87 L. Ed. 2d 267 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). In *Aguilar*, the Court had held that the Establishment Clause barred New York City from sending public school teachers into parochial schools to provide remedial education to disadvantaged children under a congressionally mandated program, Title I of the Elementary and Secondary Education Act of 1965. In *Ball*, the Court found unconstitutional a program implemented by the City of Grand Rapids, Michigan, under which nonpublic school students were taught supplemental courses by public school teachers during the regular school day on the premises of nonpublic schools. *Agostini*, 521 U.S. at 218-22, 117 S. Ct. at 2008-10.

In overruling *Aguilar* and *Ball*, the Court affirmed that the basic principles of Establishment Clause jurisprudence had not changed. However, it announced a restructuring of the *Lemon* test. It concluded that the test should be viewed as having two prongs instead of three. The first would continue to be the secular purpose prong and the second would continue to be the effects prong.

According to the Court, consideration of whether a program fosters excessive entanglement between church and state, formerly the third prong of the *Lemon* test, should more properly be considered "as an aspect of the inquiry into a statute's effect." *Id.* at 233, 117 S. Ct. at 2015. The Court also clarified the criteria used to determine whether government aid has the effect of advancing religion, indicating that the Court currently employs three criteria: whether the challenged governmental aid (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement. *Id.*

In analyzing its *post-Aguilar* and *Ball* decisions, the Supreme Court concluded that the approach used to assess religious indoctrination had changed in "two significant respects." *Id.* at 223, 117 S. Ct. at 2010. First, citing primarily to *Zobrest*, the Court explained that it had rejected the two principal presumptions upon which *Ball* and *Meek v. Pittenger*, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217 (1975), had rested. The first of these discarded presumptions was "that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.* The Court stated: "There is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures." *Id.* at 226, 117 S. Ct. at 2012.

The second abandoned presumption was that "the presence of a public employee on private school property creates an impermissible 'symbolic link' between government and religion." *Id.* at 224, 117 S. Ct. at 2011. According to the Court, there is no "perceptible . . . difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside." *Id.* at 227, 117 S. Ct. at 2012.

Second, citing *Witters*, the Court indicated that it had departed from the rule "that all government aid that directly aids the educational function of religious schools is invalid." *Id.* at 225, 117 S. Ct. at 2011. The Court went on to explain that departure is warranted in programs that are in conformity with the requirements discussed in footnote 38 of *Nyquist*, such as *Witters*. According to the Court, direct aid programs in which grants are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" are constitutional. *Id.* at 225, 117 S. Ct. at 2011 (quotations omitted). The Court also reiterated that programs like those in *Witters* and *Zobrest*, where money ultimately goes to religious institutions "only as a result of the genuinely independent and private choices of" individuals, satisfy footnote 38's criteria. *Id.* at 226, 117 S. Ct. at 2012. In such cases, religious indoctrination could not be attributed to the state.

It was also significant that under current law, the Court could not conclude that placing public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. *Id.*

at 228, 117 S. Ct. at 2012. First, aid under Title I was provided to students regardless of the school they chose to attend. Second, relying on the reasoning in *Zobrest*, the Court found it important that, by law, Title I services were supplemental to the schools' regular curricula. *Id.*, 117 S. Ct. at 2013. As the Court stated:

> These services do not, therefore, 'relieve sectarian schools of costs they otherwise would have borne in educating their students.' *Zobrest*, 509 U.S., at 12, 113 S. Ct., at 2468. . . . Title I services are [not necessarily] distributed . . . 'directly to the religious schools'. . . . In fact, they are not. No Title I funds ever reach the coffers of religious schools, compare *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 657-659, 100 S. Ct. 840, 848-849, 63 L. Ed. 2d 94 (1979) (involving a program giving 'direct cash reimbursement' to religious schools for performing certain state mandated tasks).

id. See also Peck v. Lansing Sch. Dist., 148 F.3d 619 (1998) (finding that federally funded program providing services on parochial school campuses does not run afoul of the Establishment Clause as long as instruction is supplemental to regularly provided services, award of funding is based on neutral criteria, and program imposes adequate safeguards to ensure that instruction provided is secular).

The Court stated in regard to the second effects criteria, that the program not "define its recipients by reference to religion":

> A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect,

> apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. Cf. *Witters, supra,* at 488, 106 S. Ct., at 752 (upholding neutrally available program because it did not "create a financial incentive for students to undertake sectarian education"); *Zobrest, supra,* at 10, 113 S. Ct., at 2467 (upholding neutrally available IDEA aid because it "creates no financial incentive for parents to choose a sectarian school").

521 U.S. at 230-32, 117 S. Ct. at 2014. The above-cited quote makes it clear that if a program is found not to involve state indoctrination, it may still run afoul of the Establishment Clause based on the ground that the criteria for participation in the program provides an incentive to pursue religious indoctrination. Applying this principle to the program in *Agostini,* the Court found that no such incentive to pursue indoctrination was present. As it stated: "Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school."[13] *Id.* at 232, 117 S. Ct. at 2014 (citations omitted).

The court does not find that *Agostini* undermines the vitality of *Nyquist* or otherwise supports Defendants'

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[13] The Court ultimately found the Title I program constitutional because it also did not violate the third prong of the "effects" test as it did not create excessive entanglements between church and state.

argument that the Voucher Program does not violate the Establishment Clause. The *Agostini* Court, while acknowledging that it no longer applied an absolute rule that all direct aid which supports religious institutions is barred by the Establishment Clause, made clear that the circumstances where such aid is permissible are in the context of cases like *Witters*, a class of cases different than that in *Nyquist*. In reversing its prior decision in *Aguilar* so that Title I services could be provided to students on the grounds of religious institutions, *Agostini* simply allowed students attending parochial schools to obtain remedial educational benefits which were made generally available to qualifying students without regard to the nature of the institution attended. Indeed, in *Agostini*, no monies ever went into the coffers of the religious institution and there clearly was no direct support for such institutions. The provision of services also would have no effect on a student's choice of what school to attend because the services could be utilized at any school. In one sense, such a program is similar to providing textbooks in math or science to all students regardless of the school they attend.

An analysis of the Voucher Program under the *Agostini* framework makes it clear that it runs afoul of both the indoctrination prong and the financial incentives prong of the effects test. First, this is not a program made neutrally available without regard to the religious-nonreligious, public-nonpublic nature of the institutions to be benefitted. Since there are very few nonreligious options for eligible students, one also cannot say that the decision to attend a religious school under the Voucher Program was made as a result of the genuinely independent choice

of aid recipients. As discussed above in connection with *Zobrest*, it is unnecessary to determine whether the Voucher Program "relieves sectarian schools of costs they otherwise would have borne in educating their students" because funds go directly to the coffers of religious schools. Again, there are no limitations on how the funds are to be used; thus, there are no adequate safeguards to ensure that instruction provided is secular. Accordingly, this is not the type of case in which the Court would find it warranted to depart from the rule that government aid that directly aids the educational function of a religious institution is invalid.

Second, program criteria create incentives for students to attend religious schools. Contrary to *Agostini*, students in the Voucher Program may not use their vouchers at any school they wish. Rather, they must attend a school that has chosen to participate in the Voucher Program, and the overwhelming majority of such schools are sectarian in nature. Accordingly, the provision of the services under the Voucher Program directly impacts whether a recipient chooses a religious institution.

Thus, the court concludes that the Voucher Program violates the Establishment Clause under *Agostini* because it results in prohibited governmental indoctrination and because it defines its recipients by reference to religion.

E. *Rosenberger*

The State relies upon *Rosenberger v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819, 115 S. Ct.

2510, 132 L. Ed. 2d 700 (1995), for the contention that it would be unconstitutional to exclude religious private schools from the Voucher Program, as such exclusion based solely on religion would be content-based discrimination in violation of the Free Speech Clause and would deprive religious schools and families of their equal right to pursue religious study.[14] Def. Memo in Supp. of Motion to Dismiss at 1. In *Rosenberger*, the University of Virginia had established a Student Activities Fund ("SAF") to which student groups could submit disbursement requests for certain extracurricular activities, including the printing of student publications. The SAF received its money from a mandatory fee assessed per semester to each full-time University student. "Religious activities," those activities which "primarily promoted or manifested a particular belief in or about a deity or an ultimate reality," were excluded from SAF support. 515 U.S. at 824-825, 115 S. Ct. at 2514-15.

When one student group published a magazine entitled "Wide Awake: A Christian Perspective at the University of Virginia," the Student Council Appropriations Committee refused to authorize payment of the magazine's printing costs on the ground that it was a "religious activity." The student group filed suit, alleging that the University's refusal to authorize payment solely on the basis of the publication's religious editorial viewpoint violated its rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the

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[14] The State primarily raised this argument in its motion to dismiss, but incorporated it by reference into their motion for summary judgment

law. *Id.* at 827, 115 S. Ct. at 2516. The *Rosenberger* Court held that denial of funding to Wide Awake violated the Free Speech Clause of the First Amendment as it amounted to viewpoint discrimination. *Id.* at 837, 115 S. Ct. at 2520.

The State's argument is premised on the erroneous assumption that the present situation, like *Rosenberger*, offers only two alternatives. In *Rosenberger* there were two clear alternatives – the University could either provide funding, or refuse funding, of the student publication. The State urges that if the court finds the Voucher Program unconstitutional, there is only one alternative left: to exclude all sectarian schools from any such program, based solely on their religious affiliation. Essentially, Defendants invite this court to render an advisory opinion on the constitutionality of such an alternative. The court declines Defendants' invitation. It simply holds that a program which provides no meaningful choice to scholarship recipients other than to attend sectarian schools violates the Establishment Clause.

F. Relevance of Non-Program Options

Defendants argue that, when the entire universe of educational alternatives offered by the State of Ohio is considered, the Voucher Program is but one "choice" among many, primarily nonsectarian, educational options. They include community schools and magnet schools among the options the court should consider

alongside the Voucher Program.[15] They maintain that "the Scholarship Program, as part of the State's experimentation with various forms of school choice, is a genuinely neutral form of 'public assistance' – like the G.I. Bill – that satisfies the standard the Supreme Court articulated in the well-known footnote 38 of its *Nyquist* decision." Def. State Motion at 14. For the reasons discussed below, the Defendants' position is not well-taken.[16]

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[15] Community schools are state-funded, nonreligious institutions that are independently operated by self-elected governing boards. Students are admitted to these schools on the basis of lottery. Magnet Schools are "for elementary students focused on the arts, foreign language, computers and science, or other distinctive curricular approach, and may provide Montessori methods and programs emphasizing basic skills." State Defendants' Motion for Summary Judgment at 15-16. Students are accepted into magnet schools by application only; however, assignments are based on lottery when the number of eligible applicants exceeds the number of slots at a particular school. *Id.*

[16] Defendants' proposed analysis of the educational choices available to students eligible for the Voucher Program is similar to that applied by the Wisconsin Supreme Court in *Jackson v. Benson*, 218 Wis. 2d 835, 578 N.W.2d 602 (Wis. 1998). In *Jackson*, the court considered the Milwaukee Parental Choice Program ("MPCP"), a program in which the State provided money for up to 15% of the student membership of the Milwaukee Public Schools to attend private sectarian or nonsectarian schools. In analyzing the constitutionality of the MPCP, the court considered the program in the context of "pre-existing educational choices available to MPS children." 578 N.W.2d at 614 n.9. Ultimately, the court concluded that the MPCP is neutral, and is in no way skewed toward religion. *Id.*

Although the *Jackson* court considered the MPCP in the entire context of educational alternatives available to students, its analysis fails to fully explain its reasoning for doing so.

The Supreme Court has generally grounded its decisions upholding programs which provide some type of aid to educational institutions against Establishment Clause challenges on two related principles. The first, that programs which are "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" do not offend the Establishment Clause, comes directly from *Nyquist's* footnote 38. *See Nyquist*, 413 U.S. at 783 n.38, 93 S. Ct. at 2970 n.38. The second, that a program does not violate the Establishment Clause if aid inures to the benefit of a religious institution "only as a result of the independent and private choices of aid recipients," is essentially footnote 38 in application. *Witters*, 474 U.S. at 488, 106 S. Ct. at 752. Both principles, if they are to mean anything, must be applied within the context of the challenged program. The relevant inquiry in any Establishment Clause challenge is whether the choices available under the program at issue are broad enough so as not to influence recipients to choose a religious alternative, not whether the entire universe of options available, both within and outside the program, are sufficient to ensure that a recipient's decision to choose a religious alternative can be considered independent of state influence. In other words, the concern of the Clause is not whether a party has choices beyond those provided by a state aid program, but whether, when one chooses a state program – perhaps

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Specifically, the court does not indicate why the funds challenged in that case should be considered in conjunction with funds that were not challenged. As will be discussed herein, under existing Supreme Court precedent, this court cannot adopt the analysis employed by the *Jackson* court.

over other choices – he can exercise his options within that program without being steered toward a religious institution.[17]

There are two points at which parents must make decisions with regard to sending a child to a Voucher school. First, they must decide whether to enroll their child in the Program. Second, upon deciding to do so, parents must select a school. The court's analysis must necessarily take into account the alternatives available under the latter choice as opposed to the former because it is the Voucher Program that has been challenged. Conducting this analysis reveals that the alternatives available under the Program are so narrow that a recipient's decision to attend a religious school cannot reasonably be said to have been made "only as a result of [his or her] independent and private choices."

Accepting Defendants' argument that the constitutionality of the Voucher Program should be analyzed at the point at which parents first decide whether to enroll their children in the Voucher Program as against all other available options would stand Establishment Clause jurisprudence on its head. In almost any program that could come under attack under the Clause, there are likely a myriad of alternatives a recipient must choose from before ever deciding whether to take advantage of the program's benefits. If courts were to take into account

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[17] To the extent that Defendants argue that the Tutorial Program should be considered an educational option, based upon the reasons articulated in this section, such argument is not well-taken.

such alternatives, which in many instances would arguably not be comparable to those offered under the challenged program, it would be a rare case in which a program providing aid to a religious institution would even come close to violating the Establishment Clause.

A review of the relevant cases reveals that the Supreme Court has always assessed the question of "choice" within the context of the challenged program and that the Court has never gone so far as to undertake an analysis like the one Defendants argue this court should adopt.[18] In *Witters*, for example, the Court looked to the options available to blind students to utilize monies available to them under the State of Washington's vocational rehabilitation assistance program. It found

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[18] The Defendants argue that *Mueller* supports their position because the Court there took into account the fact that the tax deduction at issue was one of many provided under the Minnesota tax laws. This argument disregards the fact that a significant basis for the Court's opinion was that, unlike the Voucher Program, the tax deduction benefitted children attending public schools; private, nonsectarian schools and private sectarian schools alike. In other words, the "choice" question in *Mueller* was, in fact, whether the challenged program applied to all students equally.

Moreover, a reading of the Court's opinion reveals that it considered the tax deduction at issue as part of the State's entire tax scheme because "legislatures have broad latitude in creating classifications and distinctions in tax statutes . . . [and therefore,] the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes [was] entitled to substantial deference." *Mueller*, 463 U.S. at 396, 103 S. Ct. at 3068 (citations omitted).

that there were sufficient options regarding the institutions at which the assistance might be utilized such that the Court could conclude that "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent private choices of aid recipients." *Id.* at 488, 106 S. Ct. at 752. In reaching its decision, the Court did not concern itself with the full range of possible options that a blind student might have apart from funds received from the program to achieve his or her educational and vocational goals. The Court in no way suggests that it would be appropriate to look at these other options in an effort to determine whether any money which flows to a religious institution under a challenged program is a result of the genuine private choice of the individual.

Defendants seek to distinguish this case from *Nyquist* by arguing, in essence, that the state of the art in education did not include magnet schools and community schools at the time of that decision. Whether or not that proposition is true as a matter of fact, there is nothing in the Court's opinion to suggest that it would have considered such information had it been available. The concern of the Court was with the fact that one wishing to utilize tuition grants under the program had very few non-religious as compared to religious options. Thus, as under the Voucher Program, there was an incentive for persons to utilize state funds under the program to attend religious institutions. Like the instant case, one could not say that the choices made by parents under the *Nyquist* program were the result of the genuine private choices of participating individuals.

The "choices" available to a Voucher student are more analogous to those offered in *Nyquist* than those in cases like *Witters, Mueller* and *Zobrest*. In *Witters,* the student applying for vocational rehabilitation assistance under the Washington statute could take the assistance he had been awarded and put it to use at any college within the State of Washington. In *Mueller,* parents of children attending any elementary or secondary school in the State of Minnesota, whether public or private, sectarian or nonsectarian, could take advantage of the tax deduction for school expenses. In *Zobrest,* the deaf student who required an interpreter under the IDEA could utilize the skills of his interpreter at any high school in the United States. In stark contrast to *Witters, Mueller* and *Zobrest,* a student who receives a voucher under the Program may apply the voucher *only* at one of the schools participating in the Voucher Program. Because a Voucher student must apply his or her voucher at one of only fifty-six participating schools, over 82% of which are sectarian, a Voucher student has no meaningful choice at all. Unlike the funds in *Witters, Mueller* and *Zobrest,* funds under the Voucher Program flow to religious institutions, not as a result of the "genuinely independent private choices of aid recipients," but rather as a result of the very nature of the Program.

VII. CONCLUSION

The separation of church and state was of prime importance to some of the most influential founders and framers of the United States Constitution. Yet it has long been recognized that it is probably not possible or desirable to erect a complete wall between the two. "[A]

scrupulous neutrality by the state, as among religions and also as between religious and other activities . . . is what is required." *Roemer, III v. Board of Pub. Works of Maryland,* 426 U.S. 736, 745-46, 96 S. Ct. 2337, 2344, 49 L. Ed. 2d 179 (1976). As a result, some types of governmental aid to religious institutions do not implicate the concerns which underlie the Establishment Clause or run afoul of its requirements, while other types do. Remote, incidental or indirect aid that flows to religious educational institutions does not violate the Clause. On the other hand, aid which is provided to directly support the educational program of such an institution, especially religious instruction and indoctrination, is normally prohibited.

The Supreme Court has carved out an exception to this general rule. Where a program is found to have a permissible secular purpose and does not foster an excessive entanglement between church and state, it will be upheld against an Establishment Clause challenge as long as two principles are satisfied. First, a program must not result in government-sponsored religious indoctrination. Where aid is provided under a neutral program and only flows to religious schools as a result of the genuine and independent choices of beneficiaries, a challenged program will not be found to result in government inculcation of religious beliefs. Second, program criteria must not create incentives for students to attend religious schools.

The Voucher Program has a valid secular purpose and there has been no challenge that it creates an excessive entanglement between church and state. Accordingly, the question in this case is whether the Program has the impermissible effect of advancing religion by

resulting in government indoctrination of religious beliefs or creating an incentive to attend religious schools. After thoroughly reviewing the submissions of the parties, the court concludes that there are no genuine issues of material fact and that the Voucher Program violates the Establishment Clause as a matter of law because it violates both of these principles.

In all pertinent respects, the Voucher Program is factually indistinguishable from the tuition reimbursement program struck down in *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973). Like *Nyquist*, only private schools receive any funds under the Program. As in *Nyquist* the vast majority of schools participating in the Voucher Program are sectarian. Of the fifty-six schools which are authorized participants, forty-six, or over 82%, are religiously-affiliated. Moreover, similar to *Nyquist*, the tuition grants provided under the Program are unrestricted. There has been no attempt to guarantee that state aid only supports secular, as opposed to religious, educational functions of participating schools. Indeed, some recent Supreme Court cases have suggested that even programs in which money does not directly flow to the coffers of a religious institution can still violate the Establishment Clause if aid is provided in such a way as to free up institution funds that would otherwise have been expended on essential, religious or nonreligious, functions.

The court is not persuaded by Defendants' arguments that *post-Nyquist* cases suggest there are meaningful distinctions between this case and *Nyquist*. It is significant that every case cited by Defendants in which

the Supreme Court sustained programs providing aid to religious educational institutions against Establishment Clause challenges explicitly discusses and distinguishes itself from *Nyquist*. Each of these cases dealt with programs in which aid was "made available generally without regard to the sectarian, nonsectarian or public, nonpublic nature of the institutions benefited," a type of program the *Nyquist* Court expressly acknowledged it did not have before it. *See* 413 U.S. at 782-783 n.38, 93 S. Ct. at 2970 n.38. Moreover, under every program, religious schools were merely incidental or indirect beneficiaries because aid benefitted them "only as a result of the genuinely independent and private choices of aid recipients." *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986). *See also Mueller v. Allen*, 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983). Additionally, none of the programs at issue in *post-Nyquist* cases incorporated eligibility criteria which impermissibly created incentives to attend religious institutions. None of them allocated aid on the basis of criteria that either favored or disfavored religion.

This case is unlike any case in which the Supreme Court has upheld programs providing aid to religious educational institutions. Because the vast majority of schools participating in the Voucher Program are sectarian in nature, the Program does not make aid available without regard to the nature of the institutions benefitted. Likewise, recipients do not have available to them the kind of "choice" contemplated by *post-Nyquist* cases. By the very nature of the Program, parents do not have a genuine choice between sending their children to sectarian or nonsectarian schools because sectarian schools

overwhelmingly predominate. Unlike cases decided after *Nyquist*, the aid provided under the Voucher Program directly benefits the religious functions of participating sectarian institutions because it cannot be said that aid only flows to religious institutions as a result of the independent and private choices of recipients. Thus, the Program has the effect of advancing religion through government-supported religious indoctrination.

The Voucher Program is also unlike *post-Nyquist* cases in that program criteria create incentives for students to attend religious schools. Voucher students may only redeem their vouchers at schools which have registered and are authorized to participate in the Program, not at any school of their choice. Because the vast majority of participating schools are sectarian in nature, the Program directly influences whether a recipient chooses to attend a religious institution.

It is important to note that this court does not rest any portion of its decision on an inquiry into, or a determination of, the number of students actually attending religious institutions under the Voucher Program. While it is impermissible to determine the constitutionality of a genuinely neutral program on a year-to-year assessment of the extent to which beneficiaries pursue religious versus nonreligious options, it is incumbent on a court to determine whether a challenged program contains genuine nonreligious options. Undertaking this determination, this court concludes that the Voucher Program is not neutral. Because of the overwhelmingly large number of religious versus nonreligious schools participating in the Voucher Program, beneficiaries cannot make a genuine, independent choice of what school to attend. A program

that is so skewed toward religion necessarily results in indoctrination attributable to the government and provides financial incentives to attend religious schools. For both of these reasons, the court finds the Program to be in violation of the Establishment Clause.

Accordingly, the court grants the Motions for Summary Judgment of Plaintiffs Doris Simmons-Harris, *et al.* and Plaintiffs Sue Gatton, *et al.* (Doc. Nos. 83 and 97, respectively), and hereby denies the Motions for Summary Judgment of Intervening Defendants Senel Taylor, *et al.* and the State Defendants, *et al.* (Doc. Nos. 82 and 92, respectively). The State Defendants are permanently enjoined from administering the Voucher Program.

Because counsel for all Plaintiffs have consented to a stay of this court's Order pending Sixth Circuit review, this court hereby stays said Order in its entirety pending such review. *See* Order of December 8, 1999 (Doc. No. 127).

IT IS SO ORDERED.

Solomon Oliver, Jr.

UNITED STATES DISTRICT JUDGE

JUDGMENT ENTRY

The court, having granted Plaintiffs' motions for summary judgment in a separate order of this same date and having denied Defendants' motions for summary judgment, now enters judgment for Plaintiffs Doris Simmons-Harris, *et al.* and Plaintiffs Sue Gatton, *et al.* and against Defendants Susan Tave Zelman, *et al.*, Intervening

Defendants Senel Taylor, *et al.* and Intervening Defendants Hanna Perkins School, *et al.*

IT IS SO ORDERED.

Solomon Oliver, Jr.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DORIS SIMMONS-HARRIS, *et al.*, Plaintiffs v. DR. SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, Defendant	Case No.: 1:99 CV 1740 JUDGE SOLOMON OLIVER, JR.
SUE GATTON, *et al.*, Plaintiffs v. DR. SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, *et al.*, Defendants	Case No.: 1:99 CV 1818 (Filed: Nov. 29, 1999) ORDER

Currently pending before the court is Intervenors/ Defendants Senel Taylor's ("Defendants") Motion for Certification, wherein they request the court to certify the following question to the Ohio Supreme Court: "Does Ohio law give preclusive effect to the resolution of the establishment clause claim in *Simmons-Harris v. Goff*, 711

N.E.2d 203 (Ohio 1999)?" For the reasons set forth below, Defendants' motion (Doc. No. 90) is denied.

I. FACTS

The Ohio Supreme Court, in *Simmons-Harris v. Goff*, 711 N.E.2d 103 (Ohio 1999), opined that the 1996 voucher program, which is in all material respects identical to the 1999 voucher program, did not violate the First Amendment's establishment clause. However, the Ohio Supreme court concluded that the 1996 voucher program, as enacted, violated the Ohio Constitution's single-subject rule.

This court, in its August 24, 1999, order granting Plaintiff's Motion for Preliminary Injunction, addressed the issue of whether the Ohio Supreme Court's decision on the establishment clause issue precludes litigation in federal court. In that order, the court concluded that the Ohio Supreme Court's decision on the establishment clause issue was not essential to its judgment. Specifically, the state law ground upon which the Ohio Supreme Court found the 1996 voucher program unconstitutional, could fully support its judgment. Therefore, the Plaintiffs in the state litigation were unable to appeal the Ohio Supreme Court's judgment to the United States Supreme Court. Indeed, "since [the United States Supreme Court's] decision would have no effect on [the Ohio Supreme Court's Judgment], it would be meaningless for the Court to hear such an appeal." August 24, 1999, order at 9. Accordingly, this court concluded that "collateral estoppel does not serve to preclude Plaintiffs

from relitigating their Establishment Clause claim here." *Id.*

Defendants now request that this court certify the above-mentioned question to the Ohio Supreme Court.

II. LAW & ANALYSIS

Utilization of the certification procedure "lies within the sound discretion of the district court." *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). "Resort to the certification procedure is most appropriate when the question is new and state law is unsettled." *Id.*

Defendant argues that the court's previous analysis of this issue leaves open the question: "does the Ohio Supreme Court have the ability to define the scope of its own judgments." Memo. in Support of Certification at 6-7. Defendant goes on to argue that, "[i]n *Simmons-Harris v. Goff*, it is undoubtedly true that the Ohio Supreme Court could have limited its judgment to the single-subject issue in the case and ignored the establishment clause issue and other remaining issues. It, however, chose not to do this." *Id.* at 7. In essence, Defendants argue that the Ohio Supreme Court considered its decision on the Establishment Clause issue necessary to its judgment. *See Id.* at 8 ("Plainly, [the Ohio Supreme Court] deemed the establishment clause issue central to its overall ruling.") Defendants also suggest that the Ohio Supreme Court's use of the word "hold" when rendering its decision on the establishment clause issue is dispositive. Finally, Defendants assert that the Ohio Supreme

Court severed the 1996 school voucher program from the remainder of the relevant statute. Therefore, according to Defendants, the 1996 school voucher program was deemed constitutional, while the remaining portion of the relevant statute was deemed unconstitutional under Ohio's single-subject rule. Based on this conclusion, Defendants argue that the Ohio Supreme Court's decisions on both issues were necessary to support its judgment.

In response, Plaintiffs point to the court's August 24, 1999, order. Plaintiffs' argue that "this Court has already fully considered and categorically rejected the argument that the Ohio Supreme Court's 'resolution' of the Establishment Clause claim in *Simmons-Harris* is entitled to preclusive effect in these actions under Ohio Law." Plaintiffs' Brief in Opp. at 1.

The court agrees with Plaintiffs. Although Defendants argue that Plaintiffs are attempting a "second bite at the apple" with the instant litigation, their motion for certification requests no less than the same regarding this issue. Indeed, the court fully addressed the collateral estoppel issue in its August 24, 1999, order; nevertheless, Defendants now request certification of this issue to the Ohio Supreme Court. As the court stated in *Fischer v. Bar Harbor Banking and Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988):

> [T]he decision whether to certify a state law issue to the state's high court "in a given case rests in the sound discretion of the federal court." Lehman Bros. v. Schein, 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974). "The purpose of certification is to ascertain what the state law is . . . " Tarr v. Manchester

> Insurance Corp., 544 F.2d 14, 15 (1st Cir.1976). However, "[i]n the absence of a definitive ruling by the highest state court, a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.' " Michelin Tires, etc. v. First National Bank of Boston, 666 F.2d 673, 682 (1st Cir.1981).

Defendants' main contention is that Ohio law on issue preclusion, or collateral estoppel, is unclear and, therefore, certification of the relevant question is warranted. Under Ohio law, a "prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action." *Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 985 (Ohio 1983). According to Defendants, the Ohio Supreme Court has promulgated two different tests regarding collateral estoppel. Defendants cite *Thompson v. Wing*, 637 N.E.2d 917, 923 (Ohio 1994), wherein the Ohio Supreme Court concluded that collateral estoppel is applicable when the relevant issue: "(1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom the collateral estoppel is asserted was a party in privity with a party to the prior action." 637 N.E. 2d at 923. Defendants argue that "[t]he standard used to evaluate whether an issue was 'passed upon and determined by a court of competent jurisdiction' under Ohio law is not entirely clear." Memo. in Support of Certification at 6. Defendants contend that the Ohio Supreme Court has not

consistently maintained that the relevant issue must have been essential to the judgment in the prior action, citing *Thompson v. Wing*, 637 N.E.2d 917, 923 (Ohio 1994), and *Fort Frye Teachers Association v. State Employment Relations Board*, 692 N.E.2d 140, 144 (1998). Thus, Defendants maintain that this court should certify this issue to the Ohio Supreme Court.

Defendants' argument is without merit. Thorough examination of *Fort Frye* and *Thompson* reveals that, although worded differently, the standards are essentially the same. In *Fort Frye*, the court reasoned:

> [w]hile the merger and bar aspects of res judicata have the effect of precluding the relitigation of the same cause of action, the collateral estoppel aspect precludes the relitigation, in a second action, of an issue that has been actually and *necessarily* litigated and determined. . . .

692 N.E. 2d at 144. (emphasis added) While the court in *Fort Frye* did not explicitly state that the relevant issue must have been essential to the prior judgment, its requirement that the issue must have been necessarily litigated and determined achieves the same result. Accordingly, the court concludes that the standard for collateral estoppel espoused by *Fort Frye* is not inconsistent with Ohio cases requiring that the issue must have been essential to the prior court's judgment.

In *Thompson*, in a portion of the decision which Defendants failed to reference, and immediately preceding the passage they did cite, the court reasoned as follows: "[c]ollateral estoppel (issue preclusion) prevents parties of their privies from relitigating facts and issues in a subsequent suit that were *fully* litigated in the prior

suit." 637 N.E.2d at 923. (emphasis added) Again, while *Thompson* did not explicitly state that the relevant issue must have been essential to the prior court's judgment, its requirement that the issue was fully litigated achieves the same result. Accordingly, the court concludes that the Ohio Supreme Court's decision in *Thompson* is not inconsistent with its decisions requiring that the relevant issue must have been essential to the prior court's judgment. Indeed, as detailed in this court's August 24, 1999, order, Plaintiffs were denied the opportunity to fully litigate the establishment clause issue because they were unable to appeal the Ohio Supreme Court's decision to the United States Supreme Court. Thus, Defendants' assertion that Ohio law is not clear on the correct standard for the application of collateral estoppel is without merit.

Essentially, Defendants urge this court to certify the relevant question so that the Ohio Supreme Court is afforded an opportunity to determine the effect of its prior decision. The certification process serves to determine how the state's highest court would resolve a particular issue. Here, there is no outstanding issue for the Ohio Supreme court to decide. As detailed above, Ohio law on collateral estoppel is clear and well settled. Instead, Defendants urge this court to certify a question to the Ohio Supreme court so that it may clarify the effect of one of its prior decisions. The court is not aware of precedent for using the certification process in this manner; even if it were appropriate, the court would not certify the question. The court has determined, in its discretion, the effect of the Ohio Supreme Court decision regarding vouchers from existing precedents. Accordingly, for the reasons set forth in the August 24, 1999,

order, collateral estoppel does not preclude Plaintiffs from pursuing their claims in this court, and Defendants' Motion for Certification is not well-taken.

III. CONCLUSION

For the reasons set forth above, Defendants' Motion for Certification (Doc. No. 90) is denied.

IT IS SO ORDERED.

/s/ [Illegible]
UNITED STATES DISTRICT JUDGE

DORIS SIMMONS-HARRIS, ET AL., Plaintiffs-Appellees, v. SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION, STATE OF OHIO, ET AL., Defendants-Appellants (00-3055/00-3060), SENEL HERMAN TAYLOR, ET AL., Intervenors-Defendants-Appellants (00-3055), HANNA PERKINS SCHOOL, ET AL., Intervenors-Defendants-Appellants (00-3063).

00-3055/00-3060/00-3063

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2001 U.S. App. LEXIS 3344

February 28, 2001, Filed

JUDGES:

BEFORE: RYAN, SILER, AND CLAY, Circuit Judges.

OPINION:

The court having received three petitions for rehearing with the suggestion for rehearing en banc, and the petitions having been circulated not only to the original panel members but to all other active* judges of the court, and less than a majority of the judges having favored the suggestion, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied.

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* Judge Moore recused herself from participation in this ruling.

Nos. 00-3055; 00-3060; 00-3063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DORIS SIMMONS-HARRIS, *et al.*,

Plaintiffs-Appellees,

v.

DR. SUSAN TAVE ZELMAN, *et al.*,

Defendants-Appellants,

SENAL HERMAN TAYLOR, *et al.*,

Intervenors-Defendants-Appellants,

HANNA PERKINS SCHOOL, *et al.*,

Intervenors-Defendants-Appellants.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

(Filed Mar. 08, 2001)

ORDER

IT IS ORDERED that the mandate be stayed to allow Defendants-Appellants and Intervenors-Defendants-Appellants in the above-referenced matter, time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but the mandate shall promptly issue if the petition is not filed within 90 days from the date of final judgment by this Court.

ENTERED BY ORDER OF THE CLERK.

/s/ Leonard Green
Clerk

OHIO REVISED CODE ANNOTATED

§ 3313.974 Definitions.

As used in this section and in sections 3313.975 to 3313.979 of the Revised Code:

(A) "Individualized education program" and "handicapped child" have the same meanings as in section 3323.01 of the Revised Code.

(B) "Mainstreamed handicapped student" means a handicapped child who has an individualized education program providing for the student to spend more than half of each school day in a regular school setting with nonhandicapped students.

(C) "Separately educated handicapped student" means a handicapped child who has an individualized education program providing for the student to spend at least half of each school day in a class or setting separated from nonhandicapped students.

(D) "Low-income family" means a family whose income is below the level which the superintendent of public instruction shall establish.

(E) "Parent" has the same meaning as in section 3313.98 of the Revised Code.

(F) "Registered private school" means a school registered with the superintendent of public instruction pursuant to section 3313.976 of the Revised Code.

(G) "Alternative school" means a registered private school located in a school district or a public school located in an adjacent school district.

(H) "Tutorial assistance" means instructional services provided to a student outside of regular school hours approved by the commission on school choice pursuant to section 3313.976 of the Revised Code.

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§ 3313.975 Pilot project scholarship program established.

As used in this section and in sections 3313.975 to 3313.979 of the Revised Code, "the pilot project school district" or "the district" means any school district included in the pilot project scholarship program pursuant to this section.

(A) The superintendent of public instruction shall establish a pilot project scholarship program and shall include in such program any school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent. The program shall provide for a number of students residing in any such district to receive scholarships to attend alternative schools, and for an equal number of students to receive tutorial assistance grants while attending public school in any such district.

(B) The state superintendent shall establish an application process and deadline for accepting applications from students residing in the district to participate in the scholarship program. In the initial year of the program students may only use a scholarship to attend school in grades kindergarten through third.

The state superintendent shall award as many scholarships and tutorial assistance grants as can be funded

given the amount appropriated for the program. In no case, however, shall more than fifty per cent of all scholarships awarded be used by students who were enrolled in a nonpublic school during the school year of application for a scholarship.

(C)(1) The pilot project program shall continue in effect each year that the general assembly has appropriated sufficient money to fund scholarships and tutorial assistance grants. In each year the program continues, no new students may receive scholarships unless they are enrolled in grade kindergarten, one, two, or three. However, any student who has received a scholarship the preceding year may continue to receive one until the student has completed grade eight.

(2) If the general assembly discontinues the scholarship program, all students who are attending an alternative school under the pilot project shall be entitled to continued admittance to that specific school through all grades up to the eighth grade that are provided in such school, under the same conditions as when they were participating in the pilot project. The state superintendent shall continue to make scholarship payments in accordance with division (A) or (B) of section 3313.979 of the Revised Code for students who remain enrolled in an alternative school under this provision in any year that funds have been appropriated for this purpose.

If funds are not appropriated, the tuition charged to the parents of a student who remains enrolled in an alternative school under this provision shall not be increased beyond the amount equal to the amount of the

scholarship plus any additional amount charged that student's parent in the most recent year of attendance as a participant in the pilot project, except that tuition for all the students enrolled in such school may be increased by the same percentage.

(D) Notwithstanding sections 124.39, 3307.54, and 3319.17 of the Revised Code, if the pilot project school district experiences a decrease in enrollment due to participation in a state-sponsored scholarship program pursuant to sections 3313.974 to 3313.979 of the Revised Code, the district board of education may enter into an agreement with any teacher it employs to provide to that teacher severance pay or early retirement incentives, or both, if the teacher agrees to terminate the employment contract with the district board, provided any collective bargaining agreement in force pursuant to Chapter 4117. of the Revised Code does not prohibit such an agreement for termination of a teacher's employment contract.

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§ 3313.976 Eligibility of private schools and public schools in adjacent districts; tutorial assistance.

(A) No private school may receive scholarship payments from parents pursuant to section 3313.979 of the Revised Code until the chief administrator of the private school registers the school with the superintendent of public instruction. The state superintendent shall register any school that meets the following requirements:

(1) The school is located within the boundaries of the pilot project school district;

(2) The school indicates in writing its commitment to follow all requirements for a state-sponsored scholarship program specified under sections 3313.974 to 3313.979 of the Revised Code, including, but not limited to, the requirements for admitting students pursuant to section 3313.977 of the Revised Code;

(3) The school meets all state minimum standards for chartered nonpublic schools in effect on July 1, 1992, except that the state superintendent at the superintendent's discretion may register nonchartered nonpublic schools meeting the other requirements of this division;

(4) The school does not discriminate on the basis of race, religion, or ethnic background;

(5) The school enrolls a minimum of ten students per class or a sum of at least twenty-five students in all the classes offered;

(6) The school does not advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion;

(7) The school does not provide false or misleading information about the school to parents, students, or the general public;

(8) The school agrees not to charge any tuition to low-income families participating in the scholarship program in excess of ten per cent of the scholarship amount established pursuant to division (C)(1) of section 3313.978 of the Revised Code, excluding any increase described in division (C)(2) of that section. The school shall permit any such tuition, at the discretion of the

parent, to be satisfied by the low-income family's provision of in-kind contributions or services.

(B) The state superintendent shall revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation of any of the provisions of division (A) of this section.

(C) Any public school located in a school district adjacent to the pilot project district may receive scholarship payments on behalf of parents pursuant to section 3313.979 of the Revised Code if the superintendent of the district in which such public school is located notifies the state superintendent prior to the first day of March that the district intends to admit students from the pilot project district for the ensuing school year pursuant to section 3327.06 of the Revised Code.

(D) Any parent wishing to purchase tutorial assistance from any person or governmental entity pursuant to the pilot project program under sections 3313.974 to 3313.979 of the Revised Code shall apply to the state superintendent. The state superintendent shall approve providers who appear to possess the capability of furnishing the instructional services they are offering to provide.

§ 3313.977 Admission of students to registered private school.

(A)(1) Each registered private school shall admit students to kindergarten and first, second, and third grades in accordance with the following priorities:

(a) Students who were enrolled in the school during the preceding year;

(b) Siblings of students enrolled in the school during the preceding year, at the discretion of the school;

(c) Children from low-income families attending school or residing in the school district in which the school is located until the number of such students in each grade equals the number that constituted twenty per cent of the total number of students enrolled in the school during the preceding year in such grade. Admission of such twenty per cent shall be by lot from among all low-income family applicants who apply prior to the fifteenth day of February prior to admission.

(d) All other applicants residing anywhere, provided that all remaining available spaces shall be filled from among such applicants by lot.

Children from low-income families not selected by lot under division (A)(1)(c) of this section shall be included in the lottery of all remaining applicants pursuant to division (A)(1)(d) of this section.

(2) Each registered private school shall first admit to grades four through eight students who were enrolled in the school during the preceding year. Any

remaining spaces for students in these grades may be filled as determined by the school.

(B) Notwithstanding division (A) of this section, except where otherwise prohibited by federal law, a registered private school may elect to admit students of only one gender and may deny admission to any separately educated handicapped student.

(C) If a scholarship student who has been accepted in accordance with this section fails to enroll in the school for any reason or withdraws from the school during the school year for any reason, the school may elect to replace such student with another scholarship student only by first offering the admission to any low-income scholarship students who filed applications by the preceding fifteenth day of February and who were not accepted at that time due to space limitations.

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§ 3313.978 Implementation of program by state superintendent and school officials; scholarships and tutorial assistance grants.

(A) Annually by the first day of November, the superintendent of public instruction shall notify the pilot project school district of the number of initial scholarships that the state superintendent will be awarding in each of grades kindergarten through third.

The state superintendent shall provide information about the scholarship program to all students residing in

the district, shall accept applications from any such students until such date as shall be established by the state superintendent as a deadline for applications, and shall establish criteria for the selection of students to receive scholarships from among all those applying prior to the deadline, which criteria shall give preference to students from low-income families. For each student selected, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the scholarship amount. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the scholarship amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the scholarship amount. The state superintendent shall notify students of their selection prior to the fifteenth day of January and whether they qualify for seventy-five or ninety per cent of the scholarship amount.

(1) A student receiving a pilot project scholarship may utilize it at an alternative public school by notifying the district superintendent, at any time before the beginning of the school year, of the name of the public school in an adjacent school district to which the student has been accepted pursuant to section 3327.06 of the Revised Code.

(2) A student may decide to utilize a pilot project scholarship at a registered private school in the district if all of the following conditions are met:

(a) By the fifteenth day of February of the preceding school year, or at any time prior to the start of the school year, the parent makes an application on behalf of the student to a registered private school.

(b) The registered private school notifies the parent and the state superintendent as follows that the student has been admitted:

(i) By the fifteenth day of March of the preceding school year if the student filed an application by the fifteenth day of February and was admitted by the school pursuant to division (A) of section 3313.977 of the Revised Code;

(ii) Within one week of the decision to admit the student if the student is admitted pursuant to division (C) of section 3313.977 of the Revised Code.

(c) The student actually enrolls in the registered private school to which the student was first admitted or in another registered private school in the district or in a public school in an adjacent school district.

(B) The state superintendent shall also award in any school year tutorial assistance grants to a number of students equal to the number of students who receive scholarships under division (A) of this section. Tutorial assistance grants shall be awarded solely to students who are enrolled in the public schools of the district in a grade level covered by the pilot project. Tutorial assistance grants may be used solely to obtain tutorial assistance from a provider approved pursuant to division (D) of section 3313.976 of the Revised Code.

All students wishing to obtain tutorial assistance grants shall make application to the state superintendent by the first day of the school year in which the assistance will be used. The state superintendent shall award assistance grants in accordance with criteria the superintendent shall establish. For each student awarded a grant, the state superintendent shall also determine whether the student qualifies for seventy-five or ninety per cent of the grant amount and so notify the student. Students whose family income is at or above two hundred per cent of the maximum income level established by the state superintendent for low-income families shall qualify for seventy-five per cent of the grant amount and students whose family income is below two hundred per cent of that maximum income level shall qualify for ninety per cent of the grant amount.

(C)(1) In the case of basic scholarships, the scholarship amount shall not exceed the lesser of the tuition charges of the alternative school the scholarship recipient attends or an amount established by the state superintendent not in excess of twenty-five hundred dollars.

(2) The state superintendent shall provide for an increase in the basic scholarship amount in the case of any student who is a mainstreamed handicapped student and shall further increase such amount in the case of any separately educated handicapped child. Such increases shall take into account the instruction, related services, and transportation costs of educating such students.

(3) In the case of tutorial assistance grants, the grant amount shall not exceed the lesser of the provider's

actual charges for such assistance or a percentage established by the state superintendent, not to exceed twenty per cent, of the amount of the pilot project school district's average basic scholarship amount.

(4) No scholarship or tutorial assistance grant shall be awarded unless the state superintendent determines that twenty-five or ten per cent, as applicable, of the amount specified for such scholarship or grant pursuant to division (C)(1), (2), or (3) of this section will be furnished by a political subdivision, a private nonprofit or for profit entity, or another person. Only seventy-five or ninety per cent of such amounts, as applicable, shall be paid from state funds pursuant to section 3313.979 of the Revised Code.

(D)(1) Annually by the first day of November, the state superintendent shall estimate the maximum per-pupil scholarship amounts for the ensuing school year. The state superintendent shall make this estimate available to the general public at the offices of the district board of education together with the forms required by division (D)(2) of this section.

(2) Annually by the fifteenth day of January, the chief administrator of each registered private school located in the pilot project district and the principal of each public school in such district shall complete a parental information form and forward it to the president of the board of education. The parental information form shall be prescribed by the department of education and shall provide information about the grade levels offered, the numbers of students, tuition amounts, proficiency

examination results, and any sectarian or other organizational affiliations.

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§ 3313.979 Payment of scholarships and grants to parents or to school district; monthly reports by private school.

Each scholarship or grant to be used for payments to a registered private school or to an approved tutorial assistance provider is payable to the parents of the student entitled to the scholarship or grant. Each scholarship to be used for payments to a public school in an adjacent school district is payable to the school district of attendance by the superintendent of public instruction.

(A)(1) By the fifteenth day of each month of the school year that any scholarship students are enrolled in a registered private school, the chief administrator of that school shall notify the state superintendent of:

(a) The number of students who were reported to the school district as having been admitted by that private school pursuant to division (A)(2)(b) of section 3313.978 of the Revised Code and who were still enrolled in the private school as of the first day of such month, and the numbers of such students who qualify for seventy-five and ninety per cent of the scholarship amount;

(b) The number of students who were reported to the school district as having been admitted by another private school pursuant to division (A)(2)(b) of section 3313.978 of the Revised Code and since the date of

admission have transferred to the school providing the notification under division (A)(1) of this section, and the numbers of such students who qualify for seventy-five and ninety per cent of the scholarship amount.

(2) From time to time, the state superintendent shall make a payment to the parent of each student entitled to a scholarship. Each payment shall include for each student reported under division (A)(1) of this section, a portion of seventy-five or ninety per cent, as applicable, of the scholarship amount specified in divisions (C)(1) and (2) of section 3313.978 of the Revised Code. This amount shall be proportionately reduced in the case of any such student who is not enrolled in a registered private school for the entire school year.

(3) The first payment under this division shall be made by the last day of November and shall equal one-third of seventy-five or ninety per cent, as applicable, of the estimated total amount that will be due to the parent for the school year pursuant to division (A)(2) of this section.

(B) The state superintendent, on behalf of the parents of a scholarship student enrolled in a public school in an adjacent school district pursuant to section 3327.06 of the Revised Code, shall make the tuition payments required by that section to the school district admitting the student, except that, notwithstanding sections 3323.13, 3323.14, and 3327.06 of the Revised Code, the total payments in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the scholarship amount provided in divisions (C)(1) and (2) of section 3313.978 of the Revised Code.

(C) Whenever an approved provider provides tutorial assistance to a student, the state superintendent shall pay the parent for such costs upon receipt of a statement from the parent specifying the services provided and the costs of the services, which statement shall be signed by the provider. The total payments to any parent under this division for all provider services to any individual student in any school year shall not exceed seventy-five or ninety per cent, as applicable, of the grant amount provided in division (C)(3) of section 3313.978 of the Revised Code.

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

SUE GATTON, et al.	:	
Plaintiffs	:	Case No. 96CVH-01-0193
v.	:	Judge L. Sadler
JOHN M. GOFF, et al.	:	
Defendants	:	

DECISION AND ENTRY OVERRULING PLAINTIFFS' MOTION FOR REASONABLE ATTORNEYS FEES, PURSUANT TO 42 U.S.C. 1988, AND FOR COSTS AND OTHER EXPENSES

SADLER, J.

Rendered this 21st day of March, 2000

This matter is before the court upon a motion filed by the plaintiffs, Sue Gatton *et al.* (collectively "plaintiffs"), seeking an award of reasonable attorney's fees. Plaintiffs argue that they are the prevailing party in this action, and are therefore entitled to an award of reasonable attorney's fees pursuant to 42 U.S.C. 1988.

Plaintiffs filed this action on January 31, 1996. At issue was the constitutionality of R.C. 3313.974 through 3313.979 of the Ohio Revised Code. Those sections established a pilot scholarship project (hereinafter "the Voucher Program") to allow parents in the Cleveland School District to use the scholarships to pay for tuition at privately operated schools within the School District.

Plaintiffs filed this action alleging that the Voucher Program violated a number of constitutional provisions, including the First and Fourteenth Amendments to the

United States Constitution; and section 7, Art. I; section 2, Art. VI; and section 26, Art. II of the Ohio Constitution. This case was consolidated with *Doris Simmons-Harris, et al. v. Goff*, Case No. 96CVH01-0721. The plaintiffs in *Simmons-Harris* alleged violations of the same constitutional provisions, and additionally alleged that the Voucher Program was enacted in violation of section 15(D), Art. II of the Ohio Constitution. By decision dated July 31, 1996, this court granted summary judgment in favor of the state, finding the Voucher Program constitutional in all respects.

Plaintiffs appealed this decision to the Tenth District Court of Appeals, which reversed, finding that the Voucher Program violated the First Amendment to the United States Constitution. *Simmons-Harris v. Goff* (May 1, 1997), Franklin App. No. 96APE08-982, 96APE08-991, unreported. This decision was subsequently appealed to the Ohio Supreme Court. The Supreme Court reversed in part and upheld in part the decision of the Court of Appeals. *Simmons-Harris v. Goff* (1999), 86 Ohio St.3d 1. The Court held that the Voucher Program was enacted in violation of section 15(D), Art. II of the Ohio Constitution. However, the court held that the Voucher Program was constitutional in all other respects, with the exception of a single selection criterion that was stricken on establishment grounds.

Subsequently, the General Assembly re-enacted the Voucher Program. Plaintiffs once again filed suit, this time in the United States District Court for the Northern District of Ohio. The District Court has ruled that the Voucher Program is unconstitutional under the First and

Fourteenth Amendments to the United States Constitution. *Simmons-Harris v. Zelman* (N.D. Ohio 1999), 54 F. Supp.2d 725. The Voucher Program continues to operate at the present time as a result of a partial stay issued by the District Court, and a full stay issued by the United States Supreme Court.

Both parties are in agreement that plaintiffs are entitled to an award of reasonable attorney's fees pursuant to 42 U.S.C. 1988 if they are a "prevailing party" under that section. See *Hensley v. Eckerhart* (1983), 461 U.S. 424. The views of the parties diverge on the question of whether the plaintiffs are, in fact, a "prevailing party" for the purposes of 42 U.S.C. 1988.

In order to be considered a prevailing party, the plaintiffs must have achieved relief that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiffs." *Farrar v. Hobby* (1992), 506 U.S. 103, 111. This requires a showing that the plaintiff has achieved a substantial portion of the relief sought, or has succeeded on a significant issue. *Chernin v. Welchans* (C.A. 6 1988), 844 F.2d 322.

Plaintiffs argue that they are a prevailing party for the purposes of 42 U.S.C. 1988 because, although the Ohio Supreme Court struck down the Voucher Program largely on State Constitutional grounds, plaintiffs were successful in striking a significant part of the program on Federal Constitutional grounds. Specifically, plaintiffs point to that portion of the Ohio Supreme Court's opinion striking R.C. 3313.977(A)(1)(d) as an unconstitutional advancement of religion by the State.

R.C. 3313.977(A) set forth a list of criteria to be used by the private schools participating in the Voucher Program to establish priorities for admission of students receiving the scholarships. Those criteria were: (1) students enrolled during the previous year; (2) siblings of students enrolled during the previous school year; (3) students residing within the school district in which the private school is located, as chosen by lot; (4) students whose parents are affiliated with any organization providing financial support to the private school; and (5) all other applicants as chosen by lot. R.C. 3313.977(A).

The Supreme Court struck down the fourth criterion on the grounds that giving preference to parents affiliated with a religious institution might encourage some parents to affiliate themselves with a religious institution solely to gain the benefit of the preference. This would constitute an action that unconstitutionally favors religion. *Simmons-Harris v. Goff*, supra, at 8. However, the court concluded that the single criterion could be stricken without altering the operation of the overall statutory scheme. Consequently, the Court severed the single unconstitutional provision, while finding that the remainder of the Voucher Program did not unconstitutionally advance religion. *Id.* at 9.

Plaintiffs argue that this portion of the holding constituted a successful outcome on a Federal Constitutional claim such that plaintiffs are a prevailing party entitled to an award of attorneys' fees. Defendants argue that the single priority stricken was a minor part of the overall program, and that the Supreme Court's decision striking that provision did not therefore "materially alter" the relationship between the parties. Defendants rely upon

the decision rendered by the Sixth Circuit Court of Appeals in *Chernin v. Welchans*, supra.

Chernin involved a suit filed by a number of landlords challenging the constitutionality of an Ohio statutory scheme allowing tenants to pay rent into court established escrow accounts. The landlords argued that the provision violated their right to due process under the United States Constitution. The Court struck a single provision of the statute, but otherwise found that the statutory scheme did not violate the landlords' right to due process. Consequently, the Court determined that the landlords were not prevailing parties entitled to an award of attorneys' fees. *Id.* at 330.

In this case, plaintiffs were seeking invalidation of the entire Voucher Program. They ultimately succeeded in having the Voucher Program stricken, but only on the grounds that the statute was enacted in violation of Section 15(D), Art. II of the Ohio Constitution. At no point during the proceedings before this court did plaintiffs argue that any single portion of the Voucher Program violated the First and Fourteenth Amendments to the United States Constitution. Instead, their argument focused on the program in its entirety. As in *Chernin*, supra, the portion that ultimately was stricken on First and Fourteenth Amendment grounds was a very minor part of the overall statutory scheme. This point was reinforced by the Supreme Court's decision to sever the offending provision of the statute while finding the remainder of the statute did not violate the Federal Constitutional provisions. Removal of the single provision did not, therefore, alter the legal relationship between the parties in any respect.

In their Reply Memorandum, plaintiffs argue that *Chernin* is inapposite to this case because the portion of the statute invalidated in that case related to the statutory time period for trial on a landlord's complaint, while the rights vindicated in this case are much more significant. Plaintiffs appear to be suggesting that the due process rights vindicated by the plaintiffs in *Chernin* are less important than the First Amendment rights vindicated by the plaintiffs in this action. The court is not aware of any authority for the notion that any constitutionally protected rights are more important than others. Plaintiffs argue that this single selection criterion stricken by the Supreme Court is different from the trial provision in *Chernin* because the selection criterion "goes right to the heart of the School Voucher Program – determining how families qualify for voucher scholarships." Plaintiffs' Reply Memorandum at p.6. However, this argument misstates the true question at issue in this case.

The question of how families are chosen to receive scholarships is significant; otherwise, the Supreme Court would not have stricken the offending criterion of selection. However, in severing the offending criterion from the statutory scheme, the Court recognized that the selection of families to receive the scholarships is simply the first step. The true issue before the Court was whether a family, once selected to receive a scholarship, could then use the scholarship to allow the recipient to attend a religiously affiliated private school. The Court struck the single offending portion of the selection criteria, and concluded that the First and Fourteenth Amendments were not violated because the scholarship funds ended in the hands of religiously affiliated schools as the result of

" 'genuinely independent and private choices' of individual parents." *Simmons-Harris*, 86 Ohio St.3d at 7 (citing *Witters v. Washington Dept. of Serv. For the Blind* (1986), 474 U.S. 481).

Consequently, plaintiffs are not a "prevailing party" entitled to an award of attorneys' fees pursuant to 42 U.S.C. 1988. Accordingly, plaintiffs' motion for an award of reasonable attorneys' fees is hereby **OVERRULED**.

/s/ Sadler
Lisa L. Sadler, Judge

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